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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

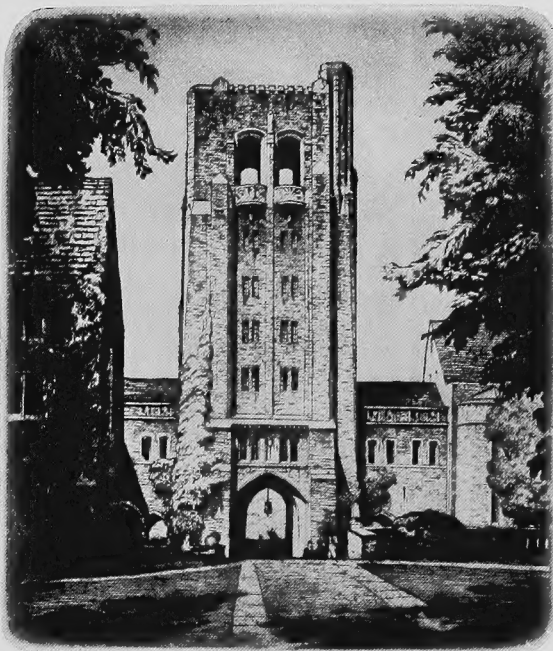
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Sackett's Instructions and requests for

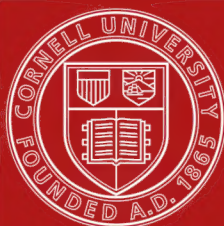


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SACKETT'S

INSTRUCTIONS

AND

REQUESTS FOR INSTRUCTIONS

IN JURY TRIALS.

SPECIALLY ADAPTED TO THE PRACTICE OF THOSE STATES WHERE
SUCH INSTRUCTIONS ARE REQUIRED TO BE IN WRITING.

SECOND EDITION REVISED.

By MARTIN L. NEWELL,
COUNSELOR AT LAW.

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PREFACE TO THE FIRST EDITION.

In offering this work to the profession, it may not be improper to state the considerations which induced its undertaking, and the objects sought to be accomplished by it. No attempt has been made to write a formal treatise on the law of instructions, or the practice of instructing juries; the design has been rather to furnish the profession in those States where instructions are required to be in writing, a work of practical utility, by collecting together, in a somewhat connected form, the decisions of the higher courts regarding the general form and essential requisites of written instructions, to be given by the court to the jury; and also, by furnishing carefully prepared general instructions upon many of the more common and intricate questions likely to arise in a general practice.

There is, perhaps, no other branch of the practice in which a young practitioner feels the need of assistance so much as in the preparation of his instructions, and requests for instructions to the jury. He generally commences the practice of his profession not only without experience, but without even a theoretical knowledge of the subject, and, in the absence of some work of this kind, without any means of acquiring such knowledge. If he refers to his usual text-books, he will find stated the general principle of law which he seeks, together with an account of its origin, history, mutations, contrary holdings and the reasons upon which it is based, with illustrations drawn from other systems of jurisprudence, while its exceptions, qualifications and limitations are treated of in another chapter; all of which may be proper enough for a learner, but it is of little assistance in the attempt to give a concise and exact statement of the whole of the law upon the point in question.

It not unfrequently happens that, for greater certainty, he quotes, in his instructions, *verbatim*, from an opinion given by the higher courts in a similar case, and ultimately finds, to his

surprise, that while the language used by the court was proper enough, taken in connection with the facts in the case under consideration, it was not intended to announce a principle of universal application, and that, as applied to his own case, his instructions are erroneous, although stated "in the very language of the Supreme Court itself."

Judging from the number of new trials granted and cases reversed, on the ground of technical and formal errors in the instructions given, it would seem that the case is not much better with many of the older members of the profession. The truth is, very few lawyers are able to write an elaborate set of instructions upon intricate points of law amidst the distractions of a hotly contested trial, without committing formal errors, which cannot be detected by the judge who tries the case in the time usually allowed for that purpose. The general rule of law applicable to the case may be recalled readily enough; but its exceptions and qualifications are apt to be overlooked under such circumstances, and the practical result is, that more new trials are granted, and more cases reversed, on the ground of informality and technical errors in the instructions, than there are for the reason that either the counsel or the court really mistook the principle of the law in the case. In view of these facts it would seem that a work of this kind is almost indispensable to the young practitioner, and that to the experienced lawyer it may be of some assistance, to say the least.

While one instruction need not embody all the law of the case, each instruction should, in itself, in a clear and concise manner, correctly state the principle of law which it purports to announce, with all its necessary exceptions and limitations, without reference to the other instructions in the case. In the following pages are contained over two thousand general instructions, complying with the above requisites, which cover most of the more difficult points which are likely to arise in a general practice. It is, of course, impossible to anticipate the ever-varying facts of different cases, but it is believed that but few cases will present themselves, involving difficult propositions of law, for which the necessary general instructions can not be found in this work, or instructions embracing the principles desired to be enunciated, which can, by very slight

verbal alterations, be adapted to the case in point, or at least serve as a guide in drawing others adapted to the peculiar facts of the case on trial. With any amount of aid from others there will always be abundant opportunities for the exercise of learning and skill in drawing special instructions to meet the facts of each particular case.

Upon some subjects the local statutes and decisions of the courts of the several States differ greatly, and it is manifestly impracticable to adapt all the instructions here given to these local laws and decisions; but as they are mostly of a general nature, each practitioner, by slight alterations, can make them conform to the statutes and practice of his own State. It must be constantly borne in mind that the object of this work is not so much to teach the law, as it is to assist in a correct statement of it; and it has been assumed that each lawyer knows the laws peculiar to his own State.

When an instruction embodies a familiar principle of law, it has not been deemed necessary to cite authorities in support of it, but in all other cases one or more authorities are given.

It may not be safe to assume that no mistakes have been made in attempting to state so many distinct propositions of law, and upon so great a variety of subjects as are contained in the following pages; but no pains or labor have been spared to avoid errors, and it is confidently believed that not many will be found.

F. SACKETT.

Chicago, December, 1880.

PREFACE TO THE SECOND EDITION.

The general favor with which the first edition of this work has been received, has induced the publishers to issue a second and revised edition, in which such errors as have been discovered are corrected, and such improvements as have suggested themselves, or been suggested by others, friends of the work, are made. It is hoped that these improvements will render the work of still greater service to the profession, and still more deserving of credit.

An eminent jurist has said that instructions should be few and those plain and simple as language can make them. (Walker, J., in *Springdale Cem. Asso. v. Smith*, 24 Ill., 480.) But when we consider that, as a general rule, they are written by lawyers in the bustle and hurry of the trial, during the arguments of opposing counsel, often when the mind is tired, and without previous study, it is not surprising that many of them, as found in the reports, are not plain and simple as language can make them.

In this edition, where it has been possible to do so without changing the legal effect, all unnecessary and surplus words have been stricken out, at all times keeping in view the object of the instruction to convey to the minds of the jurors the correct principles of the law to be applied by them to the evidence in making up their verdict.

The form of the instructions given have been held to state the law correctly in the cases where given, and may be easily modified so as to make them applicable to other cases, bearing in mind that an instruction is never proper unless based upon the evidence in the case.

MARTIN L. NEWELL.

Minonk, Illinois, May, 1888.

CHAPTER I.

INSTRUCTIONS—THEIR FORMS AND REQUISITES.

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INSTRUCTIONS.

IN the orderly and regular progress of a cause before a jury, in courts where the common law practice prevails, after the cause has been argued by the counsel on both sides, the judge proceeds to charge the jury orally, explaining to them the nature of the action and of the defense, and the points in issue between the parties, recapitulating the evidence which has been produced upon both sides, and remarking upon it when he deems it necessary or desirable, and directing or instructing the jury on all points of law arising upon the evidence; or, to quote the words of Chitty: "It is the practice for the judge at *nisi prius* not only to state to the jury all the evidence that has been given, but to comment upon its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and to advise them as regards the verdict they should give."

This common law practice, in many of the States, has been changed by statute, so as to require the court to instruct the jury as to the law of the case only, and, either peremptorily or at the request of either party, to reduce his charge to writing. The general character and scope of these changes in the common law practice will appear from the following statutory provisions of some of the States:

Illinois.—The court, in charging the jury, shall only instruct as to the law of the case. Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing.

"And when instructions are asked which the court cannot give, he shall on the margin thereof write the word, 'Refused;' and such as he approves he shall write on the margin thereof the word, 'Given;' and he shall in no case, after instructions are given, qualify, modify or in any manner explain the same to the jury otherwise than in writing." R. S. Ill., 1887, p. 976.

Colorado.—"In the trial of criminal cases in courts of record, the instructions of the court to the jury shall be given in writ-

ing, and before the argument is made by counsel to the jury, if the same shall be requested by the district attorney or by the counsel for the defense." R. S. Colo., 1883, 362.

Minnesota.—"A party may, and, if required by the court, shall, when the evidence is closed, submit, in distinct and concise propositions, the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both; they may be written and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes, but in either case they shall be entered, with any exception that may be taken, if either party requires it." R. S. Minn., 1878, 748.

Missouri.—"When the evidence is concluded, and before the case is argued or submitted to the jury, or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may of its own motion, give like instructions; and such instructions as shall be given by the court, shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence." R. S. Mo., 1879, 622.

Nebraska.—"It shall be the duty of the judges of the several district courts in all cases both civil and criminal, to reduce their charge or instructions to the jury to writing, before giving the same to the jury, unless the so giving the same is waived by the counsel in the case in open court, and so entered in the record of said case; and either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked shall be in writing.

"If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded.

No oral explanation of any instruction authorized by the

preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instruction, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case and sufficient for the reversal of the judgment rendered therein." R. S. Neb., 1887, 330.

Kansas.—"When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same and delivered to the court; the court shall give general instructions to the jury, which shall be in writing and be numbered, and signed by the judge, if required by either party." When either party asks for special instructions to be given to the jury, the court shall either give such instructions as requested or positively refuse so to do; or give the instructions with a modification in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused, so that either party may except to the instructions as asked for or as modified or to the modification or to the refusal. All instructions given by the court must be signed by the judge and filed together with those asked for by the parties as a part of the record. R. S. Kan., Chap. 80, § 275.

Dakota.—"The court, in charging the jury, shall only instruct as to the law of the case," and no court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing; and when instructions are asked which the judge cannot give, he shall write on the margin thereof the word "Refused," and such as he approves he shall write on the margin thereof the word "Given," and he shall in no case, after instructions are given, qualify, modify or in any manner explain the same to the jury, otherwise than in writing; and all instructions asked for by counsel shall be given or refused by the judge, without modification or change, unless such modification or change be consented to by the counsel asking the same. Dak. Comp. Laws, § 5048.

"The judge must then charge the jury; he may state the

testimony, and must declare the law, but must not charge the jury in respect to matters of fact; such charge must, if so requested, be reduced to writing before it is given, unless by tacit or mutual consent it is given orally, or unless it is fully taken down at the time it is given by a stenographic reporter, appointed by the court." *Ibid.*

Arizona.—Criminal Cases.—"In charging the jury, the court shall state to them all such matters of law as it may think necessary for their information in giving their verdict. The charges of the court to the jury shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent, in open court, for the charges to be given orally." *Compiled Laws Arizona*, p. 140.

Iowa.—"When the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, etc.

"The court must read over all the instructions which it intends to give, and none others, to the jury, and must write the words 'Given,' or 'Refused,' as the case may be, on the margin of each instruction.

"After argument, the court may also, of its own motion, charge the jury, which shall be exclusively in writing. The court shall not make any oral explanation of any instruction or charge."

Indiana.—"When the evidence is concluded, and either party desires special instructions to be given to the jury, such instruction shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court.

"When either party asks special instructions to be given to the jury, the court shall either give each instruction as requested or positively refuse to do so; or give the instruction with a modification, in such manner that it shall distinctly appear what instructions were given in whole or in part, and

in like manner those refused, so that either party may except to the instructions as asked for or modified, or to the modification.

“When the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing and signed by the judge, if required by either party.”

Michigan.—“In all civil and criminal cases at law, circuit courts, in charging or instructing juries, shall charge or instruct them only as to the law of the case; and such charge or instruction shall be in writing, and may be given by the court upon its own motion.

“Either party may present written requests for instructions on any point of law arising in the case. Whenever instructions are asked which the court cannot give, he shall write in the margin thereof ‘Refused;’ and such instructions as the court approves he shall designate by writing in the margin thereof the word ‘Given.’

“And the court shall in no case, orally qualify, modify or in any manner explain the same to the jury.”

Ohio.—“The court, after the argument is concluded, shall immediately charge the jury, which, or any charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party request it, before the argument to the jury is commenced; and such charge, or any charge or instruction provided for in this section, when so written and given shall in no case be orally qualified, modified or in any manner explained to the jury by the court.”

Wisconsin.—“Upon the trial of every action, the judge presiding shall, before giving the same to the jury, reduce to writing and give as written his charge and instructions to the jury; and all further and particular instructions given them when they shall return after having once retired to deliberate, unless a written charge be waived by counsel at the commencement of the trial; and except that the charge or instructions may be delivered orally when taken down by the official phonographic reporter of the court. Each instruction asked by counsel to be given to the jury shall be given without change

or modification, the same as asked, or refused in full. If any judge shall violate any of the foregoing provisions, or make any comments to the jury upon the law or facts on the trial in any action without the same being so reduced to writing or taken down, the judgment rendered upon the verdict found shall be reversed upon appeal or writ of error, upon the fact appearing."

§ 1. **Statute Mandatory—Instructions must be in Writing.**—A judge on the trial of a cause has no authority to affect or change the law as stated in written instructions, by any statement not in writing. It is error for the court to instruct the jury orally, or to orally explain or modify an instruction. *Ray vs. Woolters*, 19 Ill., 82; *Head et al. vs. Langworthy*, 15 Ia., 235; *Hardin vs. Helton*, 50 Ind., 320; *Horton vs. Williams*, 21 Minn., 187; *State vs. Jones*, 61 Mo., 232; *Miller vs. Hampton*, 37 Ala., 342; *Widner vs. State*, 28 Ind., 394; *Strattan vs. Paul*, 10 Ia., 139; *O'Donnell vs. Segar*, 25 Mich., 367.

It is violation of the statute for the court to instruct the jury orally as to the impropriety of certain modes of arriving at their verdict. *Ill. Cent. Rd. Co. vs. Hammer*, 85 Ill., 526.

§ 2. **Remarks by the Court Calculated to Influence the Jury.**—It is not proper for a court to make remarks in the hearing of a jury calculated to influence their finding. *Skelly vs. Boland*, 78 Ill., 438; *Furhman vs. Huntsville*, 54 Ala., 263; *Wannack vs. Mayer, etc.*, 53 Ga., 162; *Hasbrouck vs. Milwaukee*, 21 Wis., 217.

Remarks by the court to the jury touching the public necessity of their agreeing, or other remarks calculated to hasten their verdict, however well meant, is a practice that cannot be sustained and is unwarranted by the law, and if made in a case at law where the facts are sharply contested would vitiate the verdict. *Farnham vs. Farnham*, 73 Ill., 497.

Contra: Where a jury, after being out five hours, returned into court and announced their inability to agree upon a verdict, instructions upon their duty as to reconciling their views and arriving at a verdict, if consistent with their consciences, rather than that the parties should be put to the trouble and

expense of trying the case again, nothing being said to the prejudice of either party, are held not erroneous. *Pierce vs. Rehfuß*, 35 Mich., 53; *Allen vs. Woodson*, 50 Ga., 53.

§ 3. **In Writing may be Waived.**—While the statute requires the instructions given to the jury shall be in writing, the parties may waive that provision of the law, and when they do so and consent that the court may instruct the jury orally, they are estopped from afterwards objecting. *Bates vs. Ball*, 72 Ill., 108; *Litzelman vs. Howell*, 20 Ill. App., 588.

When oral instructions are not excepted to on that ground, at the time, the error will be regarded as waived. *State vs. Sipult*, 17 Ia., 575; *Vanwey vs. State*, 41 Tex., 639.

§ 4. **The Court may Instruct without Being Asked.**—A judge of the circuit court is at liberty to instruct, at his discretion, if he reduces his instructions to writing, so that the jury can take them with them in considering of their verdict. *Brown vs. The People*, 4 Gilm., 439; *Green vs. Lewis*, 13 Ill., 642; *Chicago vs. Keefe*, 114 Ill., 222.

§ 5. **Duty of the Court to Instruct.**—It is the duty of the judge, when requested, to instruct the jury upon every point of law pertinent to the issues. In preparing instructions each party may assume any reasonable hypothesis in relation to the facts of the case, and ask the court to declare the law as applicable to it, and it is error to refuse an instruction so framed because the case supposed does not include some other hypothesis equally rational. *People vs. Taylor*, 36 Cal., 255; *Hays vs. Paul*, 51 Penn. St., 134; *Lyttle vs. Boyer*, 33 Ohio St., 506; *Ray vs. Goings*, 112 Ill., 656.

Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake; and if the instructions of the court fail thus to instruct, it is error to refuse one calculated to cure the omission. *Muldorney vs. Ill. Cent. Rd. Co.*, 32 Iowa, 176; *Carpenter vs. State*, 43 Ind., 371; *Morris vs. Platt*, 32 Conn., 75; *Nels vs. State*, 2 Tex., 280.

It is the duty of the judge to see that every case so goes to

the jury that they have clear and intelligent notions of the points they are to decide, and to this end he should give necessary instructions whether so requested by counsel or not, and his failure so to do is held ground for a new trial where the verdict was not one which effectuated justice between the parties. *Owen vs. Owen*, 22 Ia., 270; *The State vs. Brainard*, 25 Ia., 572.

It is the duty of the court to instruct the jury as to the issues joined in the pleadings, and to determine from the pleadings what allegations are admitted and what denied. *Pharo et al. vs. Johnson*, 15 Ia., 560; *Potter vs. C., R. I. & P. R. Co.*, 46 Ia., 399; *Dussler vs. Wisley*, 32 Mo., 498.

§ 6. Should be Clear, Accurate and Concise.—Instructions should, in a clear, concise and comprehensive manner, inform the jury as to what material facts must be found in order to recover, or to bar a recovery. They should never be argumentative, equivocal or unintelligible to the jury. *Moshier vs. Kitchel*, 87 Ill., 19; *Loeb vs. Weis*, 64 Ind., 285.

Instructions should always be clear, accurate and concise statements of the law as applicable to the facts of the case. It was never contemplated, under the provision of the practice act, that the court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address; such a practice is mischievous, and ought to be discountenanced. A few concise statements of the law applicable to the facts, is all that can be required, and all that can serve any practical purpose in the elucidation of the case. *Adams vs. Smith*, 58 Ill., 417; *Trish vs. Newell*, 62 Ill., 196; *State vs. Mix*, 15 Mo., 153; *Kraus vs. Thieben*, 15 Ill. App., 482.

§ 7. Should not be Argumentative.—It is erroneous to give an instruction which is more in the nature of an argument than a statement of the law governing the case, giving undue prominence to facts relied upon, and reciting facts having no tendency to support the theory presented. *Ludwig vs. Sager*, 84 Ill., 99; *Thorpe vs. Growey*, 85 Ill., 612; *Reynolds vs. Phillips*, 13 Ill. App., 557; *Am. B. Soc. vs. Price*, 115 Ill., 628.

§ 8. **Should be Confined to Matters of Law.**—The charge of the court to the jury should be strictly confined to matters of law, and it is erroneous for the judge to tell the jury what facts are proved and what are not. The court may instruct the jury what is evidence, but not what it proves. *Russ vs. Steamboat, etc.*, 9 Ia., 374; *Thompson vs. Hovey*, 43 Ill., 198; *Wannock vs. Mayor, etc.*, 53 Ga., 162.

§ 9. **Should not Submit Questions of Law to the Jury.**—It is error to give instructions to the jury which require them to find and determine legal propositions. The court should direct the jury what the law is on the facts which the evidence tends to prove; or instruct them what the law is, if they find the facts to be as alleged or claimed. *Mitchell vs. The Town of Fond du Lac*, 16 Ill., 174; *Hudson vs. St. Louis, etc., R. Co.*, 53 Mo., 525; *Thomas vs. Thomas*, 15 B. Mon., 178.

When it appeared that there was a verbal contract between the plaintiff and another, the question as to what the contract was, was one of fact for the jury; but the question as to what the legal effect of it was, was a question of law, and it was error to submit both these questions to the determination of a jury by instructions. *White vs. Murtland*, 71 Ill., 250; *Rohrabacker vs. Ware*, 37 Ia., 85; *Lapeer, etc., Ins. Co. vs. Doyle*, 30 Mich., 159.

Whether a chattel mortgage is proved to have been *duly* acknowledged and recorded is a question of law for the court, and should not be submitted to the jury. *Bailey vs. Godfrey*, 54 Ill., 507.

In an action against a railroad company for damages for injury to private property by the construction of its road upon a public street, it was held to be error to instruct the jury to determine whether the company had constructed more tracks, or upon different lines, than were authorized by the city ordinances. The number of tracks thus authorized was a question of law, respecting which the court should have determined the legal rights of the parties. *Ingram et al. vs. The C., D. & M. R. R. Co.*, 38 Ia., 669.

§ 10. **The Degree of Care Required in a Given Case is a Question of Law.**—The law prescribes the *degree* of care re-

quired in every class of cases—in other words, whether, in a given case, a person is required to exercise slight care, reasonable care or the utmost care and diligence, is determined by the law, and is to be declared by the court; whether *such* care has in fact been exercised in the conduct of a party, in a given case, is a question of fact to be submitted to the jury.

In an action to recover for an injury caused by the negligence of the defendant, an instruction on the part of the defendant that the plaintiff cannot recover unless the proof shows that by the exercise of *due* or *proper* care he could not have averted the injury, is erroneous, as it submits a question of law to the jury as to what is proper care, and does not confine them to the fact whether the plaintiff used ordinary care, which is all the law requires. *Stratton vs. Cent. City Horse Ry. Co.*, 95 Ill., 25.

§ 11. **Abstract Propositions of Law Should not be Given, When.**—Instructions should be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms, when such terms may mislead instead of enlightening the jury. *C. & A. Rd. Co. vs. Utley*, 38 Ill., 410; *Parlman vs. Young*, 2 Dak., 175.

Instructions containing mere abstract legal propositions without any evidence to support them, are calculated to mislead the jury, and should not be given. *Stein vs. The City*, etc., 41 Ia., 353; *McNair vs. Platt*, 46 Ill., 211.

The giving of an instruction stating an abstract principle of law in a criminal case is not an error, unless the principle stated is erroneous. *Upstone vs. The People*, 109 Ill., 169.

§ 12. **Should not Ignore Facts Proven.**—When there is evidence tending to prove a fact having an important bearing upon the law of the case, though strongly contradicted, an instruction is erroneous which ignores the existence of such fact, and takes its consideration from the jury. *Chicago P. & P. Co. vs. Tilton*, 87 Ill., 547.

When the court directs the attention of the jury to the facts, it should refer them to all the facts bearing upon the issues, so as to present the case fairly for both parties. *Cushman vs. Cogswell*, 86 Ill., 62; *Snyder vs. The State*, 59 Ind., 105.

An instruction which undertakes to give a summary of the principal facts, but directs the attention of the jury only to those favorable to one of the parties, leaving out of view all that tends to illustrate the theory of the other party is objectionable. *Evans vs. George*, 80 Ill., 51; *Newman vs. McComas*, 43 Md., 70.

§ 13. **Should not Give undue Prominence to Portions of the Evidence.**—An instruction which singles out and gives undue prominence to certain facts, ignoring other facts proved and of equal importance in a proper determination of the case, is improper. *Calef vs. Thompson*, 81 Ill., 478; *Westchester F. I. Co. vs. Earle*, 33 Mich., 143; *Jones vs. Jones*, 57 Mo., 138; *Chose vs. Buhl Iron Works*, 55 Mich., 139.

§ 14. **Should not Give Prominence to Unimportant Facts.**—An instruction which calls special attention to particular points in the evidence which are indecisive, and mere circumstances bearing upon an issue of fact, and omits all reference to other important circumstances in proof, is objectionable. *Graves vs. Colwell*, 90 Ill., 612; *Chesney v. Meadows*, 90 Ill., 430.

§ 15. **Should be Given when there is any Evidence, etc.**—When the evidence tends to prove a certain state of facts, the party in whose favor it is given has a right to have the jury instructed on the hypothesis of such state of facts, and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. If the instructions are pertinent to any part of the testimony, they should, if correct, be given without regard to the amount of evidence to which they apply. *Griel vs. Marks*, 51 Ala., 566; *State vs. Gibbons*, 10 Ia., 117; *Kendall vs. Brown*, 74 Ill., 232; *Jones vs. C. & N. W. R. Co.*, 49 Wis., 352.

When an instruction is asked upon a question concerning which there is no direct testimony, yet if there be any proof tending to establish it, such question should be submitted to the jury, as the party asking the instruction is entitled to the benefit of whatever inference the jury may think proper to draw from the proof, however slight. *Peoria Ins. Co. vs. Anapow*, 45 Ill., 87; *Flournoy vs. Andrews*, 5 Mo., 513;

Camp vs. Phillips, 42 Ga., 289; *C. & W. I. R. R. Co. vs. Bingenheimer*, 116 Ill., 226.

§ 16. **Must not Assume Facts not Admitted.**—It is the province of the court to instruct the jury as to the law of the case, and that of the jury to find the facts proved by the evidence. It is error for the court, in giving an instruction, to assume that facts have been proved, or that a certain state of facts exist. *Russell vs. Minter*, 83 Ill., 150; *Stier vs. The City*, etc., 41 Ia., 353; *Siebert vs. Leonard*, 21 Minn., 442; *Jardieke vs. Scropford*, 15 Kans. 120; *C. & A. R. R. Co. vs. Robinson*, 106 Ill., 142.

Instances: “In this case the plaintiff is entitled to recover all damages proved to have been sustained by him on account of the trespass committed by the defendant on plaintiff’s premises, as claimed in the declaration.” *Small vs. Brainerd* 44 Ill., 355; *Boddie vs. State*, 52 Ala., 395; *N. I. Life Ins. Co.*, 94 U. S. Reports; *Peck vs. Ritchey*, 66 Mo., 114.

“If the jury believe from the evidence that Bond and Shinn were together and acting in concert at the time of the assault, they should find them equally guilty.” *Bond et al. v. The People*, 39 Ill., 26.

It will be seen that in the first of these examples, it is assumed, as a fact, that a trespass had been committed, and in the second, that an assault had been made.

An instruction commencing, “We will now direct your attention to the question whether the defendant gave the deceased strychnine with a criminal intent”—he’d to be erroneous, as liable to be understood by the jury to assume the disputed point, whether he gave her poison at all, leaving to them only the question of intent. *Snyder v. The State*, 59 Ind., 105.

§ 17. **Facts not. Controverted may be Assumed.**—Where an instruction assumes the existence of a fact in issue by the pleadings, but which is admitted by the party objecting in his testimony, and there is no evidence contradicting such admission, there will be no material error in giving such instruction. *Heartt vs. Rhodes*, 66 Ill., 351; *Weeks vs. Cottingham*, 58 Ga., 559.

If an instruction assumes the existence of facts not controverted on the trial, and which under the circumstances, if assumed, could not prejudice, there will be no error. *Miller vs. Kirby*, 74 Ill., 242; *Hughes vs. Monty*, 24 Ia., 499; *Davis vs. The People*, 114 Ill., 86.

It is often a matter of convenience, and avoids circumlocution, to assume the existence of certain facts about which the parties are agreed, and neither party under such circumstances can afterwards make such assumption a ground of objection to the instruction. *Martin vs. The People*, 13 Ill., 341.

When all the evidence on both sides tends clearly to prove a fact, and if true does prove it, and there is nothing to cast doubt upon it, such fact may and generally should be assumed as proved and the jury told that there is no evidence from which they can find against the fact as proved. *Druse vs. Wheeler*, 26 Mich., 189; *Caldwell vs. Stephens*, 57 Ill., 589; *Hanrahan vs. The People*, 91 Ill., 142; *Hawk vs. Brownell*, 120 Ill., 161.

§ 18. Instructions may Assume what the Law Presumes.—When the circumstances proved are of such a character that the law itself raises a presumption, the court may properly instruct the jury to draw such inference. *Herkelrath vs. Stookey*, 63 Ill., 486; *Griffin vs. C. R. I. & P. Ry. Co.*, 68 Ia., 638; 27 N. W. Rep., 792.

In giving instructions, the judge should always abstain from in any manner indicating an opinion as to the weight of evidence, unless it is of that character which the law deems conclusive. *Frame vs. Badger*, 79 Ill., 441.

§ 19. When all Material Allegations are Proved.—Whenever all the material facts necessary to enable the plaintiff to recover are averred in the declaration, it is not improper for the court to instruct the jury that, if the facts alleged in the declaration have all been proved, the plaintiff is entitled to recover, unless the defendant has established by a preponderance of evidence some one or more of the special defenses pleaded. *Amer. Cent. Ins. Co. vs. Rothschild*, 82 Ill., 166.

An instruction which tells the jury, if the plaintiff has made out his case as laid in his declaration, they must find for the

plaintiff, is not liable to the objection that it makes the jury the judges of the effect of the averments in the declaration; it merely empowers them to determine whether the proof introduced sustains the averments made in the pleadings, which they may well do. *O. & M. Ry. Co. vs. Porter*, 92 Ill., 437.

§ 20. **Construction of Contracts.**—It is the court that determines the construction of a contract. They do not state the rules and principles of law by which the jury are to be bound in construing the language which the parties have used in making the contract. They give to the jury as matters of law what the legal construction of the contract is, and this the jury are bound absolutely to take. *Eyser vs. Weissgerber*, 2 Ia., 463; *Lowry vs. Megee*, 52 Ind., 107; *Kamphouse vs. Gaffner*, 73 Ill., 453; *Curtis vs. Martz*, 14 Mich., 506; *W. St. L. & P. Ry. Co. vs. Jaggermon*, 115 Ill., 407; *Gage vs. Meyers*, 59 Mich., 300.

What the terms of a contract are (if not in writing) is a question of fact for the jury, but its meaning and legal effect are questions of law for the court. Therefore it is not proper in an instruction to submit to the jury the question of a party's rights under a contract. *Goddard vs. Foster*, 17 Wall., 123; *Thomas vs. Thomas*, 15 B. Mon., 178; *Belden vs. Woodmansee*, 81 Ill., 25; *Lucas vs. Snyder*, 2 G. Gr., 499.

Where a register's certificate of purchase was given in evidence, it was held proper to instruct the jury that the certificate was evidence of title in the person to whom it was issued, and that a judgment and execution against such person, together with a sheriff's deed thereunder, conveyed the title to the grantee therein. While instructions should not assume the existence of facts, still it is proper for the court to direct the jury as to the legal effect of the evidence admitted. *Stribling vs. Prettyman*, 57 Ill., 371; *State vs. Delong*, 12 Ia., 453.

If a contract is ambiguous in its terms it is the duty of the court to determine what it means from the evidence, and instruct the jury as to its meaning. *Ogden vs. Kirby*, 79 Ill., 555; *Stadden vs. Hazzard*, 37 Mich., 76; *Am. Ins. Co. vs. Butler*, 70 Ind., 1.

While instructions should not assume the existence of facts, which must be found by the jury, still it is proper for the

court to direct the jury as to the legal effect of documentary evidence admitted. *Stribling vs. Prettyman*, 57 Ill., 371; *Hanson vs. Eastman*, 21 Minn., 509; *Lowry vs. Megee*, 52 Ind., 107.

§ 21. **Should be Confined to the Issues Being Tried.**—The instructions of the court should be restricted to the issues made by the pleadings, and to the evidence. *Nollen vs. Wisner et al.*, 11 Ia., 190; *Iron Mount. Bank vs. Murdock*, 62 Mo., 70; *Hall vs. Strode*, 28 N. W. Rep., 312.

When the declaration alleges the personal negligence of the defendant as the ground of liability, it is a fatal objection to the instructions that they direct the attention of the jury to other and different elements of liability. *Ch. & Alt. R. R. Co. vs. Mock*, 72 Ill., 141; *Colum., C. & I. R. R. Co. vs. Troesch*, 68 Ill., 545.

When the plaintiff declares upon a completed sale, it is erroneous for the court, in instructing for him, to submit to the jury the question of an executory contract of sale. *Seckel vs. Scott*, 66 Ill., 106.

In an action on a warranty it would be error for the court to instruct the jury as to what acts constitute fraud. *Wallace vs. Wren*, 32 Ill., 146.

Where in an action upon an alleged express contract, evidence was introduced without objection, putting the fact of such contract in issue, it was held not to be error to instruct the jury with reference to an express contract, even though the pleadings put in issue an implied contract only. *Rogers vs. Millard*, 44 Ia., 466.

§ 22. **Should be Based on the Evidence.**—The instructions in all cases should be based on the evidence, and not on the facts of which there is no evidence. *Eli vs. Tallman*, 14 Wis., 28; *Hill vs. Canfield*, 56 Penn. St., 454; *Howe S. Mch. Co. vs. O. Laymen*, 88 Ill., 39; *Atkins vs. Nicholson*, 31 Mo., 488.

An instruction is properly refused when there is no evidence tending to prove the hypothetical state of facts to which it relates. *C., B. & Q. R. R. Co. vs. Dickson*, 88 Ill., 431.

It is error to give an instruction denying a party's right

upon an assumed state of facts not shown by the evidence, and calculated to give the jury to understand that, as a matter of law, the party under the contract was bound in a certain way not shown by the evidence. *Harrison vs. Cachelin*, 27 Mo., 26; *Frantz vs. Rose*, 89 Ill., 590; *Swark vs. Nichols*, 24 Ind., 199; *Bogle vs. Kreitzer*, 46 Penn. St., 465.

An instruction, in an action of trespass for an assault and battery, that the jury is the sole judge of the amount of damages that the plaintiff should recover, without stating that the damages should be estimated from the evidence, is erroneous. *Martin vs. Johnson*, 89 Ill., 537.

The jury should not be instructed in an action of trespass, that they may give punitive damages if they believe from the evidence the trespass was committed wantonly or willfully, where there are no circumstances of wantonness or willfulness to warrant such an instruction. *Waldron vs. Marcier*, 82 Ill., 550; *Wenger vs. Calder*, 78 Ill., 275.

It is error to tell the jury that it is their duty to assess damages if they believe in certain facts. Whether a plaintiff has sustained damages, and if so, how much, is a question to be determined by the jury; and it is proper for the court to instruct them that if they believe certain facts they may, or they are at liberty to, assess damages, but not that it is their duty to do so. *Chi. and N. W. Ry. Co. vs. Chisholm*, 79 Ill., 584.

§ 23. **One Instruction may be Limited by Others.**—Although an instruction, considered by itself, is too general, yet, if it is properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction. *Carrington vs. P. M. S. S. Co.*, 1 Cal., 475; *Edwards vs. Cary*, 60 Mo., 572; *Kendall vs. Brown*, 86 Ill., 387; *Skiles vs. Caruthers*, 88 Ill., 458.

§ 24. **Should be Considered All Together.**—It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to have been misled, the error will be obviated.

Anderson vs. Walter, 34 Mich., 113. *State vs. Donovan*, 10 Neb., 36.

A charge to the jury must be taken together, and it is not necessary to insert in each separate instruction all the exceptions, limitations and conditions which are inserted in the charge as a whole. *People vs. Cleveland*, 49 Cal., 578.

All the instructions should be considered together, and a judgment will not be reversed because some one of them fails to state the law applicable to the facts with sufficient qualification, provided the defects be cured in other instructions. *Rice vs. The City, etc.*, 40 Iowa, 638; *The State vs. Maloy*, 44 Iowa, 104.

§ 25. **Error will not Always Reverse.**—Where it appears, from the evidence, that a verdict is so clearly right that had it been different the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instruction. *Lundy vs. Pierson*, 83 Ill., 241; *Burling vs. Ill. Cent. Rd. Co.*, 85 Ill., 18; *Phillips vs. Ocmulgee, etc.*, 55 Ga., 633; *People vs. Welch*, 49 Cal., 177.

The refusal of instructions, which, though containing correct propositions, could not, in view of all the facts developed by the evidence, have prejudiced the party complaining, will not operate to reverse the case. *Cross vs. Garrett*, 35 Iowa, 480; *Cook et al. vs. Robinson*, 42 Iowa, 474.

§ 26. **Must be Construed in Connection with the Evidence.**—A charge given by the court must be construed in connection with the evidence in the case. It is sufficient if the instructions are correct when considered with reference to the case upon trial and the facts sought to be established. *State vs. Downer*, 21 Wis., 275; *Huffman vs. Ackley*, 34 Mo., 277.

§ 27. **When Error will Reverse.**—When a case is close in its facts, or when there is a conflict in the evidence on a vital point in the case, the rights of parties cannot be preserved unless the jury are accurately instructed. *Toledo, etc., Ry. Co. vs. Shuckman*, 50 Ind., 42; *Wabash Rd. Co. vs. Henks*, 91 Ill., 406.

An instruction which has a tendency to, and probably did, mislead the jury when taken singly, is erroneous, even though

the instructions, when taken together, embrace the law of the case. *Price vs. Mahoney*, 24 Iowa, 582; *Pittsburg, etc., Ry. Co. vs. Krouse*, 20 Ohio St., 223; *Mackey vs. People*, 2 Col. T., 13; *Murray vs. Com.*, 79 Pa. St., 311.

§ 28. **Should be Harmonious.**—The giving of a correct instruction upon a point in the case, will not obviate an error in an instruction on the other side, when they are entirely variant and there is nothing to show the jury which to adopt. *Ill. Linen Co. vs. Hough*, 91 Ill., 63; *Vanslyck vs. Mills et al.*, 34 Iowa, 375.

One correct instruction will not always cure an erroneous one. The court should harmonize the instructions, else they are calculated to confuse and mislead the jury. *Quinn vs. Donovan*, 85 Ill., 194.

Where one instruction states the defendant's liability more strongly than the law warrants, and another of the series states it correctly, and the two instructions relate to vital points in issue, they are calculated to confuse the jury, and the latter instruction will not cure the error. *Steinmeyer vs. The People*, 95 Ill., 383.

§ 29. **Instructions must Require the Jury to Believe from the Evidence.**—An instruction which does not require the jury to "believe from the evidence" the facts assumed in it, is objectionable, even if the law in the instruction is correctly stated. *Parker vs. Fisher*, 39 Ill., 164.

It is not necessary that a jury should be told in each sentence of an instruction that they should believe from the evidence. If the first part of the instruction contains this clause a jury of intelligent men will not be misled if it is omitted in the remaining portion. *Gizler vs. Witzel*, 82 Ill., 322.

It is error to instruct the jury that it is necessary for the plaintiff to prove a material fact, or that it should be made to appear from the evidence "*to the satisfaction of the jury.*" The jury in a civil case are to decide facts upon the weight or preponderance of the evidence, even though the proof does not show such facts to their satisfaction. *Stratton vs. Cent. City Horse Ry. Co.*, 95 Ill., 25.

§ 30. Instructions Need not be Repeated, When.—When the law applicable to a case is given in clear and intelligible language, the sole function of instructions is performed, and there is no necessity for repeating the same idea in different instructions, varying only in form. The court is not only under no obligation to permit a case to be argued through instructions, but it is bound to prohibit it. *Anderson vs. Walter*, 34 Mich., 113; *Keeler vs. Stuppe*, 86 Ill., 309; *I. & C. R. Co. vs. Horst*, 93 U. S., 91.

The right of a party to ask instructions must have some limit, and the supreme court will not sustain an abuse of this right. *Fisher vs. Stevens*, 16 Ill., 397; *Wright vs. Ames*, 28 Minn., 362.

It is not erroneous to refuse to give instructions asked for, however correct or applicable, if they have in substance already been given in the charge of the court. *State vs. Stanley*, 33 Ia., 526; *Cramer vs. The City of Burlington*, 42 Ia., 315; *Scott vs. Delaney*, 87 Ill., 146; *Crisman vs. McDonald*, 28 Ark., 8; *Olive vs. The State*, 11 Neb., 1.

§ 31. Instructing as in Case of Nonsuit.—It is not the province of the court to decide upon the sufficiency of the testimony pertaining to the facts in the case, nor to order the jury upon the facts to find for either party. *Oleson vs. Hendrickson*, 12 Ia., 222; *Robinson vs. Ill. C. R. R. Co.*, 30 Ia., 401.

It is the settled practice never to instruct the jury as to the weight of evidence. When conflicting, or tending to prove the issue, however slightly, it must be left to the consideration of the jury. But when it essentially varies from the pleadings and fails to sustain the issue, the court may, and should when asked, exclude it from the consideration of the jury. Excluding the evidence amounts to the same thing as instructing the jury to find for the defendant, as either course produces the same result. *House vs. Wilder*, 47 Ill., 510.

Where there is any one essential allegation of a declaration which has no proof tending to support it, it is the duty of the court to exclude from the consideration of the jury all the evidence in the case, or to charge the jury that there is no evidence to support such essential allegation, and, for want of such proof, to find for the defendant. Whether there is any

evidence tending to prove any material allegation of a declaration is a question of law for the court to determine. *Poleman vs. Johnson*, 84 Ill., 269.

Contra: When there is no conflict in the evidence, the court may direct the verdict or order a nonsuit. *Greening vs. Bishop*, 39 Wis., 552; *Johnson vs. Moss*, 45 Cal., 515; *Kelly vs. Hendricks*, 26 Mich., 256; *Am. Ins. Co. vs. Butler*, 70 Ind., 1.

Where there is a mere scintilla of evidence to establish a fact and the evidence is so overwhelmingly against it that the court would set aside the finding of a jury, if based upon such fact, then the question of the existence of such fact need not be submitted to the jury. *Hogan vs. Cushing*, 49 Wis., 169; *Com. of Marion Co. vs. Clark*, 94 U. S., 278; *May vs. I. C. R. Co.*, 35 Ia., 585.

§ 32. **Error in Admitting Evidence, Obviated by.**—If incompetent evidence is permitted to be introduced, which the court afterwards instructs the jury not to consider, no prejudice is wrought by its introduction. *Cook et al. vs. Robinson*, 42 Ia., 474.

§ 33. **When not Obviated by.**—An error in the admission of evidence is not obviated by an instruction to disregard such evidence, unless the case is such that it clearly appears no injustice or wrong has been done to the party complaining. *Howe, etc., Co. vs. Rosine*, 87 Ill., 105.

§ 34. **Effect of Evidence, Limited by.**—If evidence is admitted competent for one purpose which may have an improper effect, the party aggrieved should ask an instruction explaining its legitimate effect. *Prior vs. White*, 12 Ill., 261; *Allison vs. C. & N. W. R. R. Co.*, 42 Ia., 274.

Evidence admitted without objection cannot be excluded from the consideration of the jury by instructions. *Becker vs. Becker*, 45 Ia., 239.

Instructing that Evidence Tends to Prove.—An instruction which tells the jury that they may consider certain evidence as tending to prove a particular fact, making no comment as to

its weight or effect, is not for that reason improper. *Beattie v. Hill*, 60 Mo., 72.

§ 35. **The Jury May Come in for Further Instructions.**—A jury may be called into court for further instructions, either by agreement of counsel, or at their own request. *State vs. Pitts*, 11 Ia., 343; *Lee vs. Quirk*, 20 Ill., 392; *O'Shields vs. State*, 55 Ga., 696; *Farley vs. State*, 57 Ind., 331.

If the jury should find an insufficient verdict, the court may send them out under instructions to find formally and fully, so as to determine the rights of the parties. *Flinn vs. Barlow*, 16 Ill., 39.

§ 36. **The Giving of Further Instructions is in the Discretion of the Court.**—When the jury, in a criminal case, return into court and say that they cannot agree, it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulties in their minds. *State vs. Pitts*, 11 Ia., 343; *Hogg vs. State*, 7 Ind., 551.

A fresh discussion of the law or the evidence, on the part of counsel in the presence of the jury, cannot be had, unless allowed by the judge, in his discretion; nor is the judge required to give additional instructions at the request of either party. In such matters much must be left to the discretion of the judge. *Nelson vs. Dodge*, 116 Mass., 367.

After a jury retire to consider their verdict and come into court for further instructions, it is irregular to give such instructions in the absence of a party. *Davis vs. Fish*, 2 G. Gr., 447; *O'Connor vs. Guthrie et al.*, 11 Ia., 80; *Campbell vs. Beckett*, 8 Ohio State, 210; *Hoberg vs. State*, 3 Minn., 262.

§ 37. **Court May Limit the Time for Instructions.**—Circuit courts have the power, by reasonable and proper rules, to prescribe within what time, during the progress of the trial, the instructions must be presented to the court. *Prindiville vs. The People*, 42 Ill., 217.

§ 38. **In Criminal Cases the Jury are the Judges of the Law as well as of the Facts of the Case.**—*In some states.*—While it is true, in

the fullest sense, that a jury, in a criminal case, are the judges both of the fact and of the law, and may be so instructed by the court, they should then be left to their own responsibility alone to decide on the guilt or innocence of the prisoner, giving him the benefit of all reasonable doubts, without any reference to the possible future action of the court. *Falk vs. The People*, 42 Ill., 331; *Schnier vs. The People*, 23 Ill., 17.

In the case of *Schnier vs. The People*, the court qualified the general instruction that "the jury are the judges of the law as well as of the facts," as follows:

"If the jury can say upon their oaths that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice; that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them the right." *Schnier vs. The People*, 23 Ill., 17. See, also, *Mullinix vs. The People*, 76 Ill., 211.

CHAPTER II.

CREDIBILITY OF WITNESSES AND WEIGHT OF TESTIMONY—INSTRUCTIONS APPLICABLE TO BOTH CIVIL AND CRIMINAL CASES.

- SEC. 1. Credibility of witness and weight of testimony—Questions for the jury.
2. Circumstances affecting the credit of the witness.
 3. One credible witness entitled to more credit than a number of others.
 4. The jury have no right to disregard the testimony of a witness without cause.
 5. The credit of a witness depends upon two things.
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 15. Preponderance of the evidence.
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 17. Negative evidence, what is not—Affirmative and negative testimony.
 18. Proof as to dates—Testimony as to, corroborated.
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 20. Parties.
 21. Testimony of parties to be weighed by the jury.
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 23. Corporation, witnesses for—How to be regarded.
 24. Suits against—To be tried the same as others.
 25. Verbal admissions—How weighed.
 26. Admissions, all to be considered together—Jury may believe part and reject part.
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 29. Offer to compromise—Party not bound by.
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 31. Party not bound by statements of his own witnesses.
 32. Verdict to be determined by the evidence alone.
 33. Statements of counsel.
 34. Witness excused from answering.

CREDIBILITY OF WITNESSES.

§ 1. **The Credibility of the Witnesses and the Weight of the Testimony are Questions of Fact for the Jury.**—The court instructs the jury, that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence, or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly. *Wallace vs. State*, 28 Ark., 531; *Halloway vs. Com.*, 11 Bush, 344; *Stampofski vs. Steffens*, 79 Ill., 303, *State vs. Shields*, 55 Conn., 256; *Shellabarger vs. Nefas*, 15 Kan., 547; *Halloway vs. Com.*, 12 Bush, 334; *H. P. Ry. Co. vs. Ward*, 4 Colo., 37; *Winchester vs. King*, 48 Mich., 280.

You are the judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them; and you are not bound to take the testimony of any witness as absolutely true, and you should not do so, if you are satisfied from all the facts and circumstances proved on the trial, that such witness is mistaken in the matters testified to by him, or that, for any other reason, his testimony is untrue or unreliable. *Kavanaugh vs. Wilson*, 70 N. Y., 177; *Taylor vs. Randall*, 3 Colo., 401.

You are instructed, that you are the judges of the credit that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be so—provided you believe, from all the evidence, that such witness is mistaken or has knowingly testified falsely. *Durant vs. The People*, 13 Mich., 351; See *Wanchette vs. Wanless*, 3 Colo., 174.

§ 2. **Circumstances Affecting the Credit of a Witness.**—The jury are instructed that, in determining the weight to be given to the testimony of the different witnesses in this case,

the jury are authorized to consider the relationship of the witnesses to the parties, if the same is proved; their interest, if any, in the event of the suit; their temper, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence, and their means of information; and to give such credit to the testimony of each witness as, under all the circumstances, such witness seems to be entitled to. *Ammerman vs. Teeter*, 49 Ill., 400; *Lampe vs. Kennedy*, 60 Wis., 110.

In determining the issues in this case, we should take into consideration the whole of the evidence, and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the event of the suit, if any such is proved; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; their appearance on the stand; the reasonableness of the story told by them; and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved. *Evans vs. Lipscomb*, 31 Ga., 71; *French vs. Millard*, 2 Ohio St., 44; *Sellar vs. Clelland*, 2 Colo., 539.

The court instructs you, that in passing upon the testimony of the witnesses for the defendant, you have a right to take into consideration any interest which such witnesses may feel in the result of this suit, if any is proved, growing out of their relationship to the defendant or otherwise, and to give to the testimony of such witnesses only such weight as you think it entitled to, under all the circumstances proved on the trial.

If you believe, from the evidence, that any witness has testified under a fear of losing his employment or a desire to avoid censure or a fear of offending, or a desire to please his employer, then such fact may be taken into account by you in determining the degree of weight which ought to be given to the testimony of such witness; and, in such case, you have a right to judge of the effect, if any, likely to be produced upon the human mind by such feelings or motives, and how far such feelings or motives, on the part of a witness, may tend to warp his judgment or pervert the truth; and, after applying

your own knowledge of human nature and of the philosophy of the human mind to the investigation of the subject, are to judge of the weight which ought to be given to the testimony of such witness, taking the same in connection with all the other evidence in the case.

When witnesses are otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior; and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or want of recollection. *Pool vs. Devers*, 30 Ala., 672; *Blizzard vs. Applegate*, 61 Ind., 368.

In weighing the testimony of any or either of the witnesses in this case, you may regard the apparent capacity and intelligence of such witness, and judge from the evidence whether he was able to see and understand the transaction, and also whether he was attentive or careless, or apparently prejudiced or dispassionate; and also whether, judging from the evidence, he has any sinister motive that might lead him to fabricate that which he did not see. *People vs. Bodine*, 1 Edm. Sel. Cas., 36.

§ 3. **One Credible Witness may be Entitled to More Credit than a Number of Others.**—The court instructs you that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case. *Green vs. Taney*, 4 C. L. R., 524; *Rudolph vs. Lane*, 57 Ind., 115; *Bierbach vs. Goodyear Rub. Co.*, 54 Wis., 208.

§ 4. **The Jury have no Right to Disregard the Testimony of any Witness without Cause.**—You are instructed, that if the testimony of a witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such witness from mere caprice or without cause. It is the duty of the jury to consider the whole of the

evidence, and to render a verdict in accordance with the weight of all the evidence in the case. *City Bank, etc.*, vs. *Kent*, 57 Ga., 283; *Smith vs. Grimes*, 43 Ia., 356; *Rockford, R. I. & St. L. Rd. Co. vs. Coultars*, 67 Ill., 398; *Oliver vs. Pate*, 43 Ind., 132.

While it is the duty of the jury to carefully scrutinize and dispassionately weigh the evidence of all the witnesses in the case, still it is your sworn duty to give proper credit to the evidence of each and all of the witnesses, and, if possible, to reconcile all of the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand, or by inconsistent statements sworn to, or by testimony inconsistent with other credible evidence in the case, you are led to believe that the testimony of some one, or more, of the witnesses is untruthful or unreliable, or unless you are led to believe, from a manifestation of interest, bias or prejudice, that such witness or witnesses have been inclined to exaggerate, color or suppress the truth, or unless they have been impeached in some of the modes known to the law, as explained in these instructions. *Chester vs. State*, 1 Tex. App., 702; *Jones vs. State*, 48 Ga., 163.

§ 5. **The Credit of a Witness Depends upon Two Things:** His ability to know what occurred and his disposition for telling the truth as to the occurrence. The statement of a witness having superior opportunities for knowing what took place and superior intelligence and memory, other things being equal, is entitled to the greater weight before the jury.

One of the tests for determining the credibility of a witness is his interest in the result of the suit. As a general rule, a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not so interested, but the degree of credit to be given to each and all of the witnesses is a question for the jury alone. *Carver vs. Louthain*, 38 Ind., 530.

§ 6. **When the Jury May Disregard the Testimony of a Witness.**—The jury are instructed, that in determining the questions of fact in this case, they should consider the entire evidence

introduced by the respective parties; but the jury are at liberty to disregard the statement of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction or by proof of having made different statements at other times, or by proof of bad reputation for truth and veracity in the neighborhoods where they live—except in so far as such witnesses have been corroborated by other credible evidence, or by facts or circumstances proved on the trial. *Miller vs. The People*, 39 Ill., 458; *Bowers vs. The People*, 74 Ill., 418; *O'Rourke vs. O'Rourke*, 43 Mich., 48.

§ 7. **The Jury Should Reconcile the Testimony, if Possible.**—It is the duty of the jury in passing upon the credibility of the testimony of the several witnesses, to reconcile all the different parts of the testimony, if possible. It is only in cases where it is palpable that a witness has, deliberately and intentionally, testified falsely as to some material matter, and is not corroborated by other evidence, that a jury is warranted in disregarding his entire testimony. Although a witness may be mistaken as to some part of his evidence, it does not follow, as matter of law, that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony. *Gotlieb vs. Hailman*, 3 Col., 53.

It is the duty of the jury to consider carefully all the testimony in this case bearing upon the issues of fact submitted to them, and, if possible, to reconcile any and all apparently conflicting statements of the witnesses, and if you find it practicable to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses, it will be your duty to adopt that theory, rather than one which would require them to reject any of the testimony as intentionally false. *Rudolph vs. Lane*, 57 Ind., 115.

You are further instructed, that if, after a full and fair consideration thereof, you are unable to reconcile the statements of all the witnesses in relation to the matters pertinent to the issues submitted to you, then it will be your duty to consider on which side is the preponderance of evidence, and to find your verdict in accordance therewith. *Taylor vs. State*, 5 Tex. App., 1.

§ 8. **A Fact is Proved if Reasonably Inferred.**—The jury are instructed that in determining what facts are proved in this case they should carefully consider all the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct testimony as to such fact. *Brims vs. State*, 66 Ind., 428.

§ 9. **Willfully Swearing Falsely.**—If the jury believe, from the evidence, that the witness A. B. has willfully sworn falsely on this trial as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial. *Pierce vs. State*, 53 Ga., 365; *State vs. Kellerman*, 15 Kans., 133; *Mead vs. McGraw*, 19 Ohio St., 55 (but see *Jones vs. The People*, 2 Colo., 359); *Hoge vs. People*, 117 Ill., 45.

§ 10. **Impeachment of Witnesses.**—If the jury believe, from the evidence, that the witness A. B. has been successfully impeached on this trial, or that he has willfully sworn falsely as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial. *Bowers vs. The People*, 74 Ill., 418; *Gill vs. Crosby*, 63 Ill., 190; *Gotlieb vs. Hartman*, 3 Colo., 60; *Minich vs. The People*, 8 W. C. R., 588.

§ 11. **Bad Reputation for Truth, etc.**—The court further instructs the jury, that if they believe from the evidence that the witness A. B. is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, this fact tends to discredit his testimony, and the jury may entirely disregard it, except in so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial.

The court instructs you, that one of the modes recognized by law for impeaching the veracity of a witness, is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached, in the neighborhood in which he resides; and, if the jury believe, from the evidence in this case, that the general reputation of the witness A. B. for truth and veracity in the neighborhood where he resides, is bad, then the jury have a right to disregard the whole of his testimony, and to treat it as untrue, except where it is corroborated by other credible evidence, or by facts and circumstances proved on the trial. 1 Greenl. on Ev., § 461.

“While the law permits the impeachment of a witness by proving his general reputation for truth and veracity in the neighborhood where he resides to be bad, yet, if you believe that the plaintiff, while on the stand, gave a truthful, candid and honest statement of the facts and circumstances surrounding the transaction in question, then the jury should not disregard his testimony, but you should give it such faith and credit as in your opinion it is entitled to.” *Roy vs. Goings*, 112 Ill., 666.

§ 12. **Different Statements Out of Court.**—The court instructs the jury, that one of the modes of impeaching a witness, is by showing that he has made statements out of court at variance with his statements on the witness-stand; and if the jury believe from the evidence that the witness A. B. has made statements at another time and place at variance with his evidence in this case, regarding any material matter testified to by him, then it is the province of the jury to determine to what extent this fact tends to impeach, either his memory or his credibility, or detracts from the weight which ought to be given to his testimony. *Craig vs. Rohrer*, 63 Ill., 325; *Glaze vs. Whitley*, 5 Oreg., 164; 1 Greenl. on Ev., § 462.

The credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified on the trial, and if you believe from the evidence that the witness A. B. made statements out of court on, etc.,—to etc.,—contrary to what he has sworn upon the trial upon any material matter, then these contradictory statements would

tend to impeach the witness, and you would be justified in rejecting his testimony, if, from all the other evidence in the case, you believe such testimony to be untrue.

§ 13. **Contradictory Statements Out of Court.**—If the jury believe from the evidence that the witness A. B., before testifying in this case, has made any statements out of court concerning any of the material matters, materially different and at variance with what he has stated on the witness-stand, then the jury are instructed by the court that these facts tend to impeach either the recollection, or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his testimony. 1 Greenl. Ev., § 462; *Glaze vs. Whitley*, 5 Oreg., 164.

§ 14. **Contradictory Statements Out of Court Explained.**—The court instructs the jury, that if they believe that the witness A. B., out of court and not under oath, stated to the defendant and others, that he knew nothing about the matter, etc.—and that the defendant had told him nothing, and that the witness, when under oath, stated that his reason for so saying was, because he feared to offend the defendant and others, and also stated on oath that the defendant did tell him, etc.—then the fact of the witness making the statement out of court at variance with what he stated under oath, does not necessarily discredit the testimony of the witness under oath; the jury should judge of the credit of the witness from his whole statement, and give his evidence such weight as they believe it entitled to, in view of all the evidence given on the trial.

§ 15. **Preponderance of Evidence.**—The jury are instructed, that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view

of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence. *Mayor vs. Mead*, 83 Ill., 19; *Whittaker vs. Parker*, 42 Ia., 585; *McRae vs. Lawrence*, 75 N. C., 289; *Riley v. Butler*, 36 Ind., 51.

The court instructs you, as a matter of law, that where two witnesses testify directly opposite to each other on a material point, and are the only ones that testify directly to the same point, you are not bound to consider the evidence evenly balanced or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial, and give credence to one witness over the other, if you think such facts and circumstances warrant it. *Miller vs. Balthasser*, 78 Ill., 302; *Durant vs. Rogers*, 87 Ill., 508; *Lawrence vs. Maxwell*, 58 Barb., 511; *Delvee vs. Boardman*, 20 Ia., 446; *Johnson vs. Whidden*, 32 Me., 230.

The preponderance of evidence does not consist alone in the greater number of witnesses testifying to a particular fact or state of facts. The apparent consistency, fairness and congruity of the evidence, and the reputation of the witnesses for truth and veracity, where this is shown by the evidence, are all facts to be considered by you in determining the preponderance of the evidence, on either side. *Rudolph vs. Lane*, 57 Ind., 115.

You are instructed, that although the preponderance of the evidence is not always determined by the number of witnesses testifying in a case, yet, if in a case there are only one or two witnesses who testify to a given state of facts, and six or seven witnesses of equal candor, fairness, intelligence and truthfulness, and equally well corroborated by all the other evidence, and who have no greater interest in the result of the suit, testify against such state of facts, then the preponderance of the evidence is determined by the number of witnesses.

You are instructed, that it does not necessarily follow that a plaintiff has failed to establish his case (or a defendant his defense) by a preponderance of proof, because he has testified to a state of facts which are denied by the testimony of the defendant. In such a case, in arriving at the truth, you have a right to take into consideration every fact and circumstance

proven on the trial, such as the situation of the parties; their acts at the time of the transaction and afterwards, so far as they appear in evidence; their statements to third parties in relation to the matters in question, as well as their statements to each other in the presence of third parties, if any such statements have been proved; also their appearance on the witness stand, and their manner of testifying in the case. *Mathews vs. Story*, 54 Ind., 417; *Klassen vs. Reiger*, 26 Minn., 59; *Prowattain vs. Tindale*, 80 Penn. St., 295; *Stampofski vs. Steffins*, 79 Ill., 303; *K. P. R. Co. vs. Little*, 19 Kans., 267.

When a witness swears that a certain conversation did take place (or to a certain state of facts), and an other equally credible witness, with equal opportunities for knowing, testifies that the conversation did not take place (or to a contrary state of facts), if there is nothing in the case tending to corroborate one witness more than the other, then in law, such conversation (or alleged state of facts) cannot be regarded as proved by a preponderance of evidence. *State vs. Gates*, 20 Mo., 400.

If you believe, from the evidence, that the plaintiff has sworn positively that the defendant, etc.,—and that the defendant has sworn just as positively that he did not, etc.,—and if you further find, from the consideration of all the evidence in the case, that the testimony of defendant is entitled to as much credit as that of the plaintiff, and corroborated to the same extent, then, so far as that point is concerned, you should find for the defendant.

You are instructed that a man's reputation for truth and veracity is made by what his neighbors and persons well acquainted with him generally say of him in that regard; and if they generally say he is untruthful, that makes his reputation for truth and veracity bad. *Davis vs. Foster*, 68 Ind., 238.

You are further instructed, that if a man's neighbors and persons who are well acquainted with him, generally say that they have never heard anything said about him as to his truthfulness, that is evidence tending to show that his general reputation for truth and veracity among his neighbors and acquaintances is good. *Davis vs. Foster*, 68 Ind., 238; 1 Taylor's Law of Evi., § 325.

§ 16. **Jury Need not Disregard Testimony of Impeached Witness.**—Notwithstanding witnesses may be discredited by impeaching evidence, their testimony ought not to be wholly disregarded if it is sustained by the corroborating evidence of circumstances, or of other credible witnesses. *Smith et al. vs. Grimes et al.*, 43 Ia., 356.

The court instructs you, that while the law permits the impeachment of a witness, by proving his general reputation for truth and veracity, in the neighborhood where he resides, to be bad, still the degree of credence to which such a witness is entitled, and the weight to be attached to his testimony, are matters to be determined by you and by you alone, in view of all the evidence and of all the facts and circumstances proved on the trial.

And in this case, if you believe from the evidence that the witness A. B., while upon the witness-stand, gave a fair, candid and honest statement of the facts and circumstances surrounding the transaction in question, then you should not disregard his testimony, but you should give it such faith and credit as, in your opinion, it is entitled to.

The testimony of a witness who has been impeached ought not to be wholly disregarded by you if you feel justified, from his deportment upon the stand, or the probability of his testimony, in believing it, even if it receives no other corroboration. *Green vs. Cochran*, 43 Ia., 544; *Addison vs. The State*, 48 Ala., 478; *City Bk. vs. Kent*, 57 Ga., 258.

§ 17. **Negative Evidence, What is Not.**—The court instructs the jury, that when one or more witnesses testify to being present upon any occasion, and that certain facts then took place (or that certain words were then spoken) and other witnesses of equal credibility, having equal means of knowing what took place (or what was said), testify that they were present on the same occasion, and that such fact did not take place (or that the alleged words were not spoken), then the testimony of the latter witnesses is not what is known as negative testimony, but it is entitled to be regarded by the jury as affirmative testimony; and in such a case it is the duty of the jury to weigh all the testimony and give a verdict as the weight may preponderate to the one side or other.

Sobzy vs. Thomas, 39 Wis., 317; *Frizell vs. Cole*, 42 Ill., 362; *Sutherland vs. N. Y., etc., Rd. Co.*, 41 N. Y., 17.

You are instructed, as a matter of law, that if other things are equal, affirmative testimony is in general entitled to more weight than negative testimony. If you believe from the evidence that witness A. B. is a credible witness and you find that he has sworn that he was present upon the occasion in question and saw the defendant (pick up a ten-dollar bill and hand it to P.) then this is what is known as affirmative testimony, and is for that reason entitled to more weight than negative testimony, and if you further believe from the evidence that the witness C. D. is a credible witness and you find that he has sworn that he also was present at the time in question, and did not see the defendant (pick up any bill, etc.), then his evidence upon this point is what is known as negative evidence, and for that reason is entitled to less weight than the testimony of the witness A. B. upon the same point, provided you further believe from the evidence that the two witnesses are otherwise entitled to equal credit and that both have been corroborated to the same extent. *Pool vs. Devers*, 30 Ala., 672; *Johnson vs. State*, 14 Ga., 55.

§ 18. **Proof as to Dates, Testimony as to, Corroborated.**—The jury are instructed, that whether little or much reliance should be placed upon the unaided memory of witnesses as to dates, and whether greater weight should be attached to testimony in regard to dates accompanied by written memorandum of facts, containing the date in question, are questions exclusively for the jury, and if the jury believe from the evidence that greater weight should be attached to the latter class of testimony, then the jury should give credit accordingly.

§ 19. **Burden of Proof.**—The jury are further instructed, that the burden of proof in this class of cases is always upon the party holding the affirmative; and any matter asserted by one party and denied by the other, can only be proved in law by a preponderance of the evidence; and in this case, if the jury find from the evidence that the plaintiff has proved the alleged contracts by only one witness, and that the contract has been denied by one witness of equal credibility and means

of knowledge, then as a matter of law such contract has not been proved, unless in the minds of the jury there have been facts or circumstances proved corroborating the plaintiff's witness sufficient to outweigh the testimony on the part of the defendant.

The court instructs you, as a matter of law, that the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If you find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and you should find for the defendant.

§ 20. **Parties.**—The jury are instructed, that while our statute renders parties to a suit competent witnesses, and allows them to testify, still the jury are the judges of the credibility and weight of such testimony; and in determining such weight and credibility, the fact that such witnesses are interested in the result of the suit, if it so appears from the evidence, may be taken into account by the jury, and they may give such testimony only such weight as they think it fairly entitled to under all the circumstances of the case, and in view of the interest of such witnesses. *Hill vs. Sprinkle*, 76 N. C., 355.

§ 21. **Testimony of the Parties to be Weighed by Jury.**—The court instructs the jury, that while the law makes the defendant (or plaintiff) a competent witness in this case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to. *Nelson vs. Vorce*, 58 Ind., 455.

§ 22. **Party Failing to Testify.**—The court instructs the jury, as a matter of law, that while the statute of this State authorizes a party to a suit to go upon the stand and testify in his own favor, he is under no obligation to do so; and if he fails to do so, the jury have no right to infer from this fact alone anything prejudicial to such party, and no intendment should

be made against him because he does not testify in his own favor. *Lowe vs. Massey*, 62 Ill., 47.

The defendant had a right to offer himself as a witness in his own behalf on this trial; that he has not done so was at his own option; and this omission on his part to testify in his own favor is a proper subject for your consideration, and you have a right to determine in view of all the facts and circumstances proved on the trial what inference you will draw from such omission to testify. *Whitney vs. Bayley*, 4 Allen, 73.

The law is that when a witness testifies to certain alleged facts within the knowledge of a party to the suit, and which tend to his prejudice, and he does not offer himself for a witness, and no reason is given why he is not called, then the jury may take his failure to testify into consideration in determining what credit ought to be given to the witness who has testified to such alleged facts. *Perkins vs. Hitchcock*, 49 Me., 468; *Pullen vs. Glidden*, 68 Me., 559.

§ 23. Corporations—Witnesses for, How Regarded.—The jury are instructed that they have no right to disregard the testimony of defendant's witnesses through caprice, or without cause, merely for the reason that they are in the employ of a corporation (or a railroad company). The credibility of the defendant's witnesses should be judged of, by the jury, precisely the same as they judge of the credibility of other witnesses.

§ 24. Suits against, to be Tried the Same as Others.—It is the imperative duty of the jury to try this cause and to decide it precisely the same as they would if it was a suit between two individuals; and the fact that the plaintiff is an individual and the defendant a corporation, should make no difference with the jury. In considering and deciding the case, the jury should look solely to the evidence for the facts, and to the instructions of the court for the law of the case, and find their verdict accordingly without any reference to who is plaintiff or who is defendant.

§ 25. Verbal Admissions, How Weighed.—The court instructs the jury, that although parol proof of the verbal admissions of a

party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence. Yet, as a general rule, the statements of a witness as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence and give it the consideration to which it is entitled, in view of all the other evidence in the case. *Martin vs. The Town, etc.*, 40 Ia., 390; *Saveland vs. Green*, 40 Wis., 431; *Mauro v. Platt*, 62 Ill., 450.

You are further instructed, as a matter of law, that parol evidence of the verbal admissions of a party to a suit, may be evidence of the most satisfactory character, or it may be regarded as belonging to the very weakest class of testimony, depending upon the surrounding circumstances.

If you can see, from the evidence, that the alleged admissions were clearly and understandingly made by the party, and that they are precisely identified, and the language correctly remembered and accurately repeated by the witness, then such testimony is entitled to great weight.

But if it appears to the jury, from the circumstances proved, that the party himself may have been misinformed, or may not have expressed his own meaning clearly and understandingly, or that the witness may have misunderstood him, or that the witness had no reason or motive for remembering the exact language used, or where, from lapse of time or for any other reason, the jury can see that the witness is liable to be mistaken, or unable to give the exact words really used by the party, or their exact equivalents, then but little reliance should be placed upon this class of testimony. *Hall vs. Leyton*, 16 Tex., 262.

§ 26. Admissions, All to be Considered Together—The Jury may Believe Part and Reject Part.—The jury are instructed, that

the rule of law, that the whole of a declaration or an alleged confession must all be taken together by the jury and considered by them, does not mean that the jury must believe it all, if they accept any part of it as true. The jury may believe such parts of the alleged declaration or statement, as in view of all the facts and circumstances proved, they believe are true or credible, and reject such portions, if any, as they believe to be untrue or unreliable.

That while the jury are not required to give equal credence to every part of the statements or admissions of the defendant, if they believe, from the evidence, that any such statements or admissions have been proved, yet the whole of such statements should be carefully weighed and considered by the jury in the light of all the surrounding circumstances appearing in evidence—the motives which may have induced it—its consistency with the other evidence; and the jury, without capriciously or causelessly accepting or rejecting any portion, should credit such parts as they find reason for believing, and reject that part which they find reason for disbelieving, in view of all the facts and circumstances proved on the trial. *Eiland vs. The State*, 52 Ala., 322; *State vs. Hollenscheit*, 61 Mo., 302; *Riley vs. State*, 4 Tex. App., 538; 1 Greenlf. Ev., § 201, 202; Best on Ev., § 520.

§ 27. **Admissions to be Taken All Together—How to be Weighed.**—The admissions of a party, when proved, are evidence against him, and, although such admissions are to be taken together as a whole, the jury are not bound to regard all parts of them with equal confidence. The fact that they are against his interest, or in favor of it, their improbability, inconsistency, contradiction or corroboration, by other facts in proof, are circumstances proper to be considered by the jury in determining the weight to be given to such admissions or to the several parts thereof. *Riley vs. State*, 4 Tex. App., 538.

§ 28. **When Party not Estopped by.**—The jury are instructed that the admissions of a party to a civil suit, knowing his rights, if clearly proved, are strong evidence against him; but he is at liberty to prove that such admissions were mistakenly made, or were untrue; unless some other person has been

induced by them to alter his condition; in which case, as to such persons, or those claiming under them, he is estopped from disputing the truth of his admissions; but he is not estopped as to other persons who have not acted upon the faith of such admissions. *Ray vs. Bell*, 24 Ill., 444.

The court further instructs you, that while the admissions of a party are competent evidence to go to the jury, the party against whom they are shown is always allowed to disprove them, if they are not true. He may show that they are not true, but were made for a purpose or in ignorance of the facts, and if he shows that they were not true, he will not be bound by them—unless it appears from the evidence that the opposite party, or those under whom he claims, have acted upon such admissions and altered his or their condition on the faith of such admissions. 1 Greenlf. Ev., § 204.

§ 29. **Offer to Compromise, Party not Bound by.**—The jury are instructed, that parties have a right to get together and buy their peace, by making concessions to each other; and any offer or proposition of settlement, if made for that purpose merely, will not be binding upon the party as an admission of the amount due or claimed at the time. *Barker vs. Bushnell*, 75 Ill., 220; *Payne vs. Rd. Co.*, 40 N. Y. S. Ct., 8 *Plummer vs. Carrier*, 52 N. H., 287; *Gay vs. Bates*, 99 Mass., 263.

§ 30. **'Admissions in Affidavit for Continuance.**—The court instructs the jury, that the plaintiff, by admitting the statements contained in the affidavit for a continuance, which were read in evidence before you, simply admits that if the said witness A. B. were present here as a witness testifying in this case, he would testify as stated in the affidavit; but the plaintiff does not admit that such testimony would be the truth; he has the same right to contradict such admitted testimony as though the witness were present and had testified to the same matter on the witness-stand. And if the jury believe, from all the evidence in the case, that the said witness was not present on the occasion testified to by the other witnesses, or did not hear what was said, or did not know what took place, at the time referred to, or is mistaken in his statement of the facts, or that, for any other reason appearing in evidence, such admitted

testimony is not reliable, then the jury have a right to so regard it, and give their verdict as seems to be warranted from all the evidence in the case. *U. S. L. Ins. Co. vs. Wright*, 33 Ohio St., 533.

The court further instructs you that you are to give full faith and credit to the matters of fact stated in the affidavit for a continuance, and read to the jury as matters which the defendant expected to prove by the absent witness A. B., precisely to the same extent as if the said A. B. had been here personally present and examined as a witness, and had sworn to the truth of those matters on the witness-stand.

You are further instructed that you are to give full credit to the matters of fact stated in defendant's affidavit for a continuance, as to what he expects to prove by the said absent witness A. B., precisely to the same extent as if the witness had been present and examined in this case, and had sworn precisely as set forth in the affidavit, as read to the jury.

And you should give such statements in the affidavit, as to what defendant expects to prove by said witness, all the weight to which they would be entitled if such statements had been sworn to by the witness, on the witness-stand, in the presence of the jury.

That the admissions made in this case, relating to what defendant expects to prove by the absent witness A. B., are to be considered by you the same as if the same witness had been examined as a witness in the case, and had testified on oath, before you, that he was present upon the occasion referred to by the other witnesses, during the whole of the interview, etc., etc.; and if such testimony has not been contradicted, or disproved by other evidence in the case, or by circumstances proved on the trial, then you must take such statement of fact as true.

§ 31. **Party not Bound by Statements of His Own Witnesses.**—The court instructs the jury, that when a party offers a witness and places him on the witness-stand he thereby represents him in general to be worthy of belief; but such party is not thereby precluded from proving the truth of any particular fact by any other competent testimony, in direct contradiction to what such witness may have testified to; and this is

true not only when it appears that the witness was mistaken, but also when the evidence may collaterally have the effect of showing that he was generally unworthy of belief. *Skipper vs. Georgia*, 59 Ga., 63; *Warren vs. Gabriel*, 51 Ala., 235; *Gibbs vs. Hayler*, 41 N. Y., 191; *Blackburn vs. Com.*, 12 Bush Ky., 181; *Becker vs. Koch*, 10 N. E. Rep., 701.

§ 32. **Verdict to be Determined by the Evidence Alone.**—In determining any of the questions of fact presented in this case the jury should be governed solely by the evidence introduced before them. The jury have no right to indulge in speculations or conjectures not supported by the evidence.

§ 33. **Statements of Counsel.**—The jury are instructed that it is not proper for counsel, in the argument of a case, to state any matter or things bearing upon the questions of fact, and claimed to be within his own personal knowledge, or which may have been stated to him by others, not witnesses in the case.

And you are further instructed to disregard all such statements, if any have been made, and to make up your verdict upon the evidence actually given in this case, without placing any reliance upon, or giving any credit to, any statements of counsel not supported by the evidence.

In determining any of the questions of fact presented in this case you should be governed solely by the evidence introduced before you.

The court instructs you, that an attorney is a competent witness for his client on the trial of a cause; and the testimony of such a witness should not be disregarded by you, simply because he is an attorney testifying in favor of his own client. In such a case, you are the judges of the weight and credit to which such testimony is entitled. You may consider whether the statements of the witness are apparently fair and candid, or otherwise; whether they are consistent with themselves, and to what extent, if any, they are corroborated or contradicted by other evidence in the case, and give to the testimony such faith and credit as you believe it entitled to, in view of all the facts and circumstances appearing on the trial.

You are instructed, that while the law allows an attorney on the trial of a cause to testify as a witness in favor of his own client, still, the weight and credit which should be given to such testimony are questions exclusively for you; and if, from all the facts and circumstances appearing on the trial, you are satisfied that the attorney, A. B., from feeling or prejudice, or from devotion to the interests of his client, or for any other reason, has exaggerated or suppressed the truth, or in any manner colored his testimony, as to any material matter, then you have a right to take such fact into consideration, together with all the other evidence in the case, in determining what degree of weight or credit ought to be given to his testimony.

NOTE.—It is of doubtful professional propriety for an attorney to become a witness for his client on the trial of a cause, without first entirely withdrawing from any further connection with the case as attorney; and an attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism, if not suspicion. *Ross et al. v. Demos*, 45 Ill., 447; *Best on Ev.*, § 184; 1 *Greenlf. on Ev.*, § 364, 386.

§ 34. **Witness Excused from Answering.**—In this case the witness A. B. was asked whether, etc., and declining to answer the question on the ground that the answer might criminate himself, he was excused from answering. From this failure to answer, the jury must not infer that, etc.,—the jury are not at liberty to suppose, infer or imagine what would have been his answer, if one had been given. The case, so far as that question to that witness is concerned, stands as if the question had not been put. The jury must act upon the evidence in the case and not upon what they may imagine the evidence might have been. *People vs. Brewer*, 27 Mich., 134.

CHAPTER III.

ACCOUNT STATED.

- SEC. 1. 1. Need not be stated in express terms.
 2. Must be agreed to.
 3. Settlement presumed to include all items.
 4. Can only be opened for fraud or mistake.
 5. Account rendered not objected to, admitted.
 6. May be opened for fraud or mistake.
 7. Contradicting receipt.
 8. Receipt, *prima facie* correct.
 9. Settlement and receipt obtained by duress.

§ 1. Need not be Stated in Express Terms.—The jury are instructed, that in order to constitute an account stated, it is not necessary that the admission of the parties, that the balance struck is correct, should be made in express terms. If a creditor has rendered his account to the debtor, exhibiting the items thereof, and the amount due thereby, and the account is not objected to by the debtor within a reasonable time, the acquiescence of the debtor therein is to be taken as an admission that the account was truly stated. *Powell vs. P. R. R.*, 65 Mo., 658; 1 Greenleaf Ev., Sec. 197; *Freeland vs. Heron*, 7 Cranch, 147; *Hayes vs. Kelley*, 116 Mass., 300.

§ 2. Must be Agreed to.—In order to constitute an account stated it must appear from the evidence that the parties either expressly or impliedly agreed upon a balance due. And although you may believe from the evidence that at the time in question the parties got together and looked over their accounts and struck a balance this would not be binding upon the parties as an account stated unless you further believe from the evidence that both the parties then agreed or understood, that such balance should be regarded as the amount due from the defendant to the plaintiff. *Reinhardt vs. Hines*, 51 Miss. 344; *Cape G. Rd. Co. vs. Kimmel*, 58 Mo., 83; *Stenton vs. Jerome*, 54 N. Y., 408.

Although you may believe from the evidence that some time about, etc., the plaintiff made out a statement of account including items on both sides of the account, and struck what he called a balance and showed the same to the defendant and requested him to make payment thereon—and further, that the defendant made no objection to the statement of account at that time, this alone would not be sufficient to constitute an account stated, provided that you further believe from the evidence that the plaintiff did not leave the statement with the defendant and that no balance was in fact agreed upon by the parties or assented to by the defendant as the amount due from one party to the other. *Payne vs. Walker*, 26 Mich. 60.

§ 3. **Settlement Presumed to Include all Items.**—If you believe, from the evidence, that some time about, etc., the plaintiff and defendant met together, and looked over their accounts for the purpose of settling the same, and that they then settled and agreed upon a balance due, then the law will presume that such settlement embraced all the items that each had against the other that were then due; and in such case it devolves upon the party asserting the contrary to prove, by a preponderance of evidence, that the item, etc., was omitted by consent of the parties, or by accident and unintentionally, or by the fraud of the other party. *Straubher vs. Mohler*, 80 Ill., 21; *Allrecht vs. Gies*, 33 Mich., 289.

§ 4. **Can Only be Opened for Fraud or Mistake.**—If you believe, from the evidence, that some time on or about, etc., the parties to this suit met and looked over their accounts together, and settled all matters between them, and struck a balance and agreed upon that as the amount due from one to the other, then, in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon. 1 Am. & Eng. Ency., 125.

You are instructed, that when two parties have a settlement and adjust all their accounts, and agree upon the balance due, neither party can afterwards open the settlement without first showing that there was some fraud practiced on him, or a mis-

take made by both parties; and the burden of proof is upon the party wishing to open the settlement, to show, by a preponderance of evidence, that there was a fraud practiced upon him, or that the parties were laboring under a mistake in relation to some matter of fact which entered into, or affected the settlement. *Quinlan vs. Keiser*, 66 Mo., 603; *Wilson vs. Frisby*, 57 Ga., 269; *Hawskins vs. Long*, 74 N. C., 781; *Kronenberger vs. Bing*, 55 Mo., 121; *White vs. Campbell*, 25 Mich., 463.

§ 5. **Account Rendered not Objected to, is Admitted.**—Where a party sends, by mail, a statement of account to another with whom he has dealings, which is received, but not replied to within a reasonable time, the acquiescence of the party is taken as an admission that the account is correctly stated; and what is a reasonable time in this connection, is a question for the jury to determine, under all the circumstances of the case, considering the nature of the business, the distance of the parties from each other, and the means of communication between them. *Bailey vs. Bensley*, 87 Ill., 556; *Darby vs. Lastrapes*, 28 L. Ann., 605; *Powers vs. P. Rd. Co.*, 65 Mo. 658.

When two parties have running accounts with each other, and a statement of the account is made by one party and submitted to the other, and the latter acquiesces in its correctness, the law will regard it as a stated account, by which both parties will be bound, unless it can be shown that some error or mistake has been made, or fraud practiced; and the burden of proving the error, mistake or fraud, is on the party alleging it. *Bradley vs. Richardson*, 2 Blackf. (U. S.), 354.

When two parties have a running account, and one makes a statement of the account and sends it to the other, by mail, and the latter keeps it an unreasonable time, without making any objection to it, he must be held to have consented to its being correct, and he will not afterwards be permitted to question its correctness, unless he can show that there is some error, mistake or fraud in the account, of which he was ignorant when he so consented to it. *Freas vs. Fruitt*, 2 Col. T., 489.

§ 6. **May be Opened for Fraud or Mistake.**—Although you may believe, from the evidence, that the plaintiff sent, and the defendant received, the accounts of sales read in evidence on this trial, and that the defendant made no objection to them at the time they were received, still, if you further believe, from the evidence, that said accounts of sales contained erroneous charges or false accounts, and that the plaintiff knowingly concealed from the defendant the fact of their being erroneous or false, and that the defendant did not, and could not, by the exercise of reasonable care, have ascertained or discovered such errors or false statements, then a failure on his part to object to said accounts, at the time of receiving them, does not in law estop him from afterwards showing the truth in reference to the matters contained in such statements. *Vandever vs. Stalesir*, 39 N. J. Law, 593; *Petut vs. Crawford*, 51 Miss., 43; *Anthony vs. Day*, 52 Howard, N. Y. Pr., 35; 1 Am. and Eng. Ency., 125; *Duffy vs. Hickey*, 63 Wis., 312.

§ 7. **Contradicting Receipt.**—The court instructs the jury that a receipt is but *prima facie* evidence of payment, and may be contradicted by parol testimony; and if the jury believe, from the evidence, that the plaintiff did the extra work for which this suit is brought, at the request of the defendant, expressed or implied, and that defendant has not been paid for the same, and further, that the receipt introduced in evidence was not intended to cover that item, or that the item was overlooked, and by the mistake of the parties not included in the settlement when the receipt was given, then the jury should find for the plaintiff as to that item. 2 Pars. on Cont., 555; 1 Greenl. Ev., § 305; *Branch vs. Dawson*, 36 Minn., 193.

§ 8. **Receipt Prima Facie Correct.**—The jury are instructed, that a receipt which says on its face that it is a receipt in full, must be taken to be in full of all matters which were claimed, or could have been brought forward at the time it was given, unless it appears, by a preponderance of the evidence, that some item or matter of claim was omitted by mistake of the parties, or by the fraud of the person taking the receipt. 1 Greenl. Ev., § 212; *Sherman vs. Crosby*, 11 Johns. 70.

§ 9. **Settlement and Receipt Obtained by Duress.**—If you believe, from the evidence, that at the time of the alleged settlement between the parties, and when the receipt in question was given, the plaintiff was in embarrassed circumstances financially, and that he had money due to him from the defendant and from other persons, and that he was dependent upon receiving prompt pay from the defendant and from such other persons, to save himself from serious loss or financial ruin, that defendant knew all this, and if the jury further believe, from the evidence, that the plaintiff then claimed that there was due to him from the defendant a much larger sum than (\$1,000), and that the defendant for the purpose of compelling plaintiff to accept (\$1,000) in full, of the amount so claimed by him, refused to pay the plaintiff any portion of what was due, except upon condition that the plaintiff should accept the (\$1,000) in full payment, and give a receipt in full of all demands, and also threatened to take steps to stop payment to plaintiff by the other persons so indebted to him, and that by these means the plaintiff was induced against his free will and consent to accept the (\$1,000) and to give the receipt in full, then the plaintiff is not bound by such alleged settlement nor by the receipt as a receipt in full. *Vyne vs. Glenn*, 41 Mich., 112; *Sholey vs. Mumford*, 60 N. Y., 498; *Stenton vs. Jerome*, 54 N. Y., 480.

If you believe, from the evidence, that at the time of the alleged settlement and the giving of the receipt in question, the defendant was indebted to the plaintiff for work and material furnished under the building contract put in evidence, and that he then claimed that there was then due to him from the defendant more than (\$1,000), and also that plaintiff was indebted in a considerable amount for material used, and to the men employed by him in doing said work, and that he was dependent upon the money due to him from defendant to pay what he owed for such labor and material, and that a failure to promptly pay these debts of his would result in serious loss to him, and that defendant knew all this and refused to pay the plaintiff any portion of what he owed him, except upon condition that he accept (\$1,000) in full payment and

give a receipt to that effect, and that the plaintiff was induced by these means, against his free will and consent, to agree to accept (\$1,000) in full and to give the receipt in question, then such settlement is not binding upon the plaintiff, nor is he bound by the receipt as a receipt in full.

CHAPTER IV.

AGENCY.

- SEC. 1. General instructions of principal.
2. Departure of business of principal.
 3. Agency must be shown, when.
 4. Agency presumed to continue, when.
 5. Warranty within the apparent scope of, etc.
 6. Public officer, principal not bound by acts of.
 7. In case of torts.
 8. Goods furnished minor child.
 9. Goods furnished the wife.
 10. Wife living separate from the husband without her fault.
 11. In case of desertion by wife.
 12. Ratification of agent's acts.
 13. Ratification must be with full knowledge.
 14. Ratification without full knowledge.
 15. Ratification cannot be as to part only.
 16. Permitting one to hold himself out as agent.
 17. Agent personally liable.
 18. Notice to an agent binding, when.
 19. Good faith required of the agent.
 20. Corporations only act by agents.
 21. Corporations may ratify unauthorized acts.
 22. Individual members, etc., cannot act.

§ 1. **General Instructions of Principal.**—The jury are instructed, that where the directions of the principal to his agent are general as to the business which he is intended to perform, then the principal is held to have confided in the discretion of his agent, and he will be answerable for all the acts of the agent in the performance of the duty required.

§ 2. **Departure from Business of Principal.**—The jury are instructed, that if the directions of the principal to his agent are specific to do some specific thing, and the servant disregards his specific instructions, and goes about doing something else, not reasonably within the scope of the authority given,

the master will not be liable for such acts of the servant, unless they are afterwards ratified by him.

§ 3. **Agency Must be Shown, When.**—The jury are instructed, that the plaintiff cannot recover in this action against the defendant C. D. for the acts or alleged trespasses of the said A. B. without establishing the relation of principal and agent between the said A. B. and the said C. D., and the mere fact that the former was in the employ of the latter is not alone sufficient to establish such agency and the jury will not be justified in finding a verdict against the defendant C. D., unless they believe from the evidence that the defendant C. D. directed or authorized the seizure of the goods as charged in the declaration, or that he ratified or approved the act after it was done, or else that the said A. B. in seizing the goods was acting as the agent of the said C. D. and within the scope of his general authority as such agent. And the jury are further instructed that if they believe from the evidence that the said A. B. was in the employ of the said defendant at the time in question in the capacity of, etc., and that his duties were confined to, etc., then it would not be within the scope of his general authority as agent of the said C. D. to seize the goods of the plaintiff as charged in the declaration.

You are instructed, that a principal is bound by the acts of his agent only so far as those acts are specially authorized by the principal, or are within the scope of the agent's apparent authority; unless such acts are afterwards ratified by the principal.

§ 4. **Agency Presumed to Continue, When.**—The jury are instructed, that it is a rule of law, that when a person is shown to have been an agent of another in a particular business, and continues to act as such agent, within the scope of his former authority, it will be presumed that his authority continues, and his acts will bind his principal, unless the person with whom he deals has notice that his agency has ceased, or until after the lapse of such a length of time as ought to put a reasonably prudent man on inquiry as to the continuance of such agency. *Barkley vs. Rensselaer, etc., Co.*, 71 N. Y., 205; *Packer vs. Hinkley, etc.*, 122 Mass., 484; *Murphy vs. Otten-*

heimer, 84 Ill., 39; *Howe, etc., vs. Linder*, 59 Ind., 307; *Summerville vs. Han. & St. Joe Rd. Co.*, 62 Mo., 391.

You are instructed, that no statement made by the witness, T. B., either before or after the delivery of the note offered in evidence, or in relation to the transaction out of which it grew, is binding upon the defendants, unless it was made in their presence and hearing without objection from them, or unless the jury believe from the evidence that the said T. B. was acting as the agent of the said defendants in regard to the subject-matter of such statements at the time the statements are alleged to have been made; and unless the jury believe from the evidence that the said A. B. was at the time the agent of the defendants and authorized to represent them in regard to the said note, etc., etc., the jury should disregard all evidence of any statements made by him to the plaintiffs in the absence of the defendants, purporting to come from them or to give expression to their wishes, intentions or purposes in regard to, etc.

§ 5. **Warranty within the Apparent Scope of, etc.**—The court further instructs the jury, that while it is true that the principal is not bound by the unauthorized acts of his agent, when such acts are beyond the scope of the agent's apparent authority, yet the principal is bound by a warranty, made by an agent, of the quality of an article sold by the agent, when the buyer is justified, from the nature of the business and the manner of doing it, in believing that the authority to make the warranty had been given, and the buyer had no means of knowing the limitation of the agent's authority. 1 *Parsons on Cont.*, 52; *Murray v. Brooks*, 41 Ia., 45.

You are instructed, that it is a rule of law that a person dealing with one known to be an agent, or claiming to be such, is bound, at his peril, to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent authority. *Peabody v. Hord*, 46 Ill., 242.

§ 6. **Public Officer.**—The jury are instructed, that it is a general rule that if a special agent, whose authority is conferred by statute or by orders of court, or one acting in the

capacity of a public officer, acts outside of the authority conferred, the principal will not be bound by his acts. *Dart v. Hercules*, 57 Ill., 446.

§ 7. **In Case of Torts.**—The jury are instructed, that if a tort or wrong is committed by an agent, in the course of his employment while pursuing the business of his principal, and it is not a willful departure from such employment and business, the principal will be liable for the act, although it is done without his knowledge. *Noble v. Cunningham*, 74 Ill., 51; *Cooley on Torts*, 533; *Hamilton v. Third Ave. Rd. Co.*, 53 N. Y., 25.

You are instructed as a matter of law, that the principal is held liable for the wrongful acts of his agents if done in the course of his employment as such agent although the principal did not authorize, justify, or participate in such acts, or even if the principal forbade the acts or disproved of them. And, in this case, if you believe from the evidence that the said A. B. did seize and take the property of the plaintiff mentioned in the declaration without legal or justifiable excuse for so doing as explained in these instructions, and that in so doing the said A. B. was acting as the agent of the defendant and within the scope of his employment as such agent, then you must find the defendant guilty of the trespasses complained of.

§ 8. **Goods Furnished Minor Child.**—The court instructs the jury, as a matter of law, that if a father permits his minor child to purchase goods on his account, and the father pays for them without objection, this will afford a presumption of agency with full power to make like purchases in the future.

You are instructed that either an express promise, or circumstances from which a promise may be inferred, must be proved, by a preponderance of the evidence, before the father can be made liable for goods sold and delivered to his minor child. *Gotts vs. Clark*, 78 Ill., 229; *Fowlkes vs. Baker*, 27 Tex., 135; *Schouler's Domestic Reln.*, 329; *Swain vs. Tyler*, 26 Vt., 9; *Thayer vs. White*, 12 Met., 343.

You are instructed, that either an express promise, or circumstances from which a promise by the father may be inferred, is essential, in all cases, to bind him for necessaries

furnished his infant child by a third person. Where the father and mother separate by mutual consent, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and he is bound by her contracts for necessities furnished for them. *McMillan vs. Lee*, 78 Ill., 443.

§ 9. **Goods Furnished the Wife.**—The jury are instructed, that where goods, necessary and suitable to the position in life of a wife living with her husband, are sold to her on the credit of her husband, and charged to him, a jury will be justified in finding that the wife was the agent of her husband to make the purchases; and, in this case, if the jury believe from the evidence, that the goods, for the price of which this suit is brought, were furnished to the defendant's wife while she was residing with him, and that they were necessary and suitable to the position in life of the wife, then the defendant is liable to pay for the same; unless the jury further believe, from the evidence, that the defendant had forbidden the plaintiff selling goods to his wife on credit. 1 Pars. on Cont., 287; Schouler's Dom. Rela., 77.

You are instructed, as a matter of law, that if a husband neglects to furnish his wife, while living with him, with all articles of necessity suitable to his condition in life, then the wife may procure them of others, and the husband will be liable to pay for the same.

You are instructed, as a matter of law, that if a husband neglects to provide his wife and family with articles of necessity suitable to his condition in life, the wife may procure them of others, and the husband will be liable to pay for them. The term, article of necessity, in this connection, includes whatever things are proper to be used in the family, and suitable to the manner of life which the husband authorizes or permits. *Clark vs. Cox*, 32 Mich., 204.

You are further instructed, as a matter of law, that a husband will not be liable for necessities purchased by his wife without his knowledge or consent, if such goods are purchased from one with whom there has been no previous dealings by the wife on the credit of the husband; provided the jury believe, from the evidence, that the husband had suitably

supplied his wife with such necessities, or with the money with which to buy them. A tradesman in such case supplies goods to the wife at his peril, if the husband is guilty of no neglect in the premises. *Ibid.*

§ 10. **Wife Living Separate from the Husband without her Fault.**—If the jury, believing from the evidence that the plaintiff sold the goods for which this suit is brought, to the defendant's wife while she was living separate and apart from him without his consent, still the defendant will be liable to pay for the same if the jury further believe, from the evidence, that the goods furnished were necessary and suitable and proper for the wife, regard being had to the condition in life of herself and husband, and that the wife had good and sufficient cause for living separate and apart from her husband, as explained in these instructions; and also that he had failed and refused to furnish her such necessities or the money with which to purchase them. *Thorpe vs. Shapleigh*, 67 Me., 235.

§ 11. **In Case of Desertion by Wife.**—The jury are instructed, as a matter of law, that if a wife deserts her husband without sufficient cause, as explained in these instructions, or remains separate from him without his consent, and without good and sufficient cause, he will not be liable for necessities purchased by her. *Oinson vs. Heritage*, 45 Ind., 73; *Bevier vs. Gallo-way*, 71 Ill., 517.

You are further instructed, that if you believe, from the evidence, that the plaintiff sold the goods sued for, to the defendant's wife, while she was living separate and apart from her husband, without his consent, then to entitle the plaintiff to recover in this suit he must prove, by a preponderance of evidence, that the wife had just and legal reason to live separate from her husband, as explained in these instructions. *Rea vs. Durkee*, 25 Ill., 504; *Wilson vs. Bishop*, 10 Ill. App., 588.

If you believe, from the evidence, that the merchandise for which this action is brought was sold by plaintiff to defendant's wife, and that at that time she was living apart from her husband, and that the plaintiff was knowing to that fact, then to entitle the plaintiff to recover, the burden of proof is on the plaintiff to show, by a preponderance of evidence, that the

wife was living apart from her husband, with his consent, or that the wife was justified in leaving her husband on account of his cruel treatment, or that his conduct was so violent as to lead her to reasonably fear personal violence, or on account of some other fault of the husband, which rendered it improper for her to live and cohabit with him. *Rea vs. Durkee*, 25 Ill., 503; *Bevier vs. Galloway*, 71 Ill., 517.

You are instructed, that a husband is not bound by law to support his wife, or even to furnish her with necessaries, while she is living separate and apart from him, if she so lives, without his consent, and without any good or sufficient reason or cause therefor, as explained in these instructions.

And in this case, though you may believe, from the evidence, that the goods in question were furnished by the plaintiff to the wife of the defendant, as claimed, and that the goods were necessaries, and suitable and proper to a person in her condition and station in life, still, if you further believe, from the evidence, that when the goods were furnished to Mrs. "A," she was living separate and apart from her husband without his consent, and without any good or sufficient cause therefor, as explained in these instructions, then the defendant is not liable to pay for the goods so furnished, simply from the relationship of husband and wife between himself and Mrs. "A." *Schouler's Dom. Rela.*, 90; 1 Bishop M. & D., § 573.

§ 12. **Ratification of Agent's Acts.**—The law is, that where a person's name is signed to a promissory note without his authority, he may afterwards ratify its execution and acknowledge its binding validity upon him, and if he does this his relation to the note will be precisely the same as if he executed it personally. *Paul vs. Berry*, 78 Ill., 158; *Eadie vs. Ashbaugh*, 44 Ia., 519.

You are instructed, that a principal who, with the full knowledge of all the material facts affecting his rights, receives the benefit of an unauthorized agreement, made for him by one purporting to be his agent, is precluded thereby from questioning the agent's authority in the transaction. *Pike vs. Douglass*, 28 Ark., 59.

You are further instructed, that a principal, when fully informed of his agent's acts, must dissent from them in a

reasonable time, or he will be held to have ratified them. And in this case, if you believe, from the evidence, that defendant received full information of the acts of the said A. B. in the premises, on or before, etc., and remained silent and inactive until, etc., then that was not a reasonable time in which to dissent from the acts of the said A. B. *Meyer vs. Morgan*, 51 Miss., 21; *Hawkins vs. Lange*, 22 Minn., 557; *Breed vs. Cent City Bk.*, 4 Col., 481; *U. S. R. S. Co. vs. Rd.*, 37 Ohio St., 450; *Waterson vs. Rogers*, 21 Kans., 529; *Heyn vs. O'Hagan*, 60 Mich., 150.

You are instructed, that although you may believe, from the evidence, that the said A. B. was not authorized to make a bargain with the plaintiff for the defendant, in relation to, etc., yet if you believe, from the evidence, that the said A. B. did make the contract for the defendant, as alleged and claimed by the plaintiff, and that the defendant, with full knowledge of what had been done, ratified the bargain so made, then the contract will be as binding upon the defendant as if he had authorized the said A. B. to make the bargain in the first instance. *City of Detroit vs. Jackson*, 1 Doug. (Mich.), 106; *Hall vs. Chicago, etc., R. Co.*, 48 Wis., 317; *Stewart vs. Maher*, 32 Wis., 344; *Drakely vs. Gregg*, 8 Wall. (U. S.), 242.

§ 13. **Ratification Must be with Full Knowledge.**—The jury are instructed, that before a person can be bound by the ratification of an act, done on his behalf by one professing to act as his agent, it must appear, by a preponderance of the evidence, that he was fully informed of all the material facts affecting his rights in the transaction, and unless it does so appear, he will not be bound by an unauthorized act, upon the ground of ratification alone. *Kerr vs. Sharp*, 83 Ill., 199; *Bannon vs. Warfield*, 42 Md., 22; *Roberts vs. Rumley*, 58 Ia., 301; *Etna Ins. Co. vs. N. W. I. Co.*, 21 Wis., 458; *Proctor vs. Tows*, 115 Ill., 138.

That when the act of ratifying the act of the agent is claimed to be implied, from a knowledge of the facts, by the principal, it must appear, by a preponderance of the evidence, that the principal had full knowledge of all the facts affecting his interests in the transaction. *Farwell vs. Meyer*, 35 Ill. 40; *Jemison vs. Parker*, 7 Mich., 355; *Connatt vs. Chicago*, 114 Ill., 233.

§ 14. **Ratification without Full Knowledge.**—The court instructs the jury, that it is a rule of law, that where an alleged principal does anything towards ratifying an act done in his behalf by an unauthorized person, and the acts of ratification are done in ignorance of, or under a mistake of, any of the material facts affecting the interests of the principal, then the act of ratification will not be binding on the principal. *Mil-ler vs. Board of, etc.*, 44 Cal., 166.

§ 15. **Ratification Cannot be as to a Part Only.**—The jury are instructed, as a matter of law, that if a person adopts a contract made on his behalf by an agent, who had no authority to make it, he must adopt it in its entirety; he cannot adopt it in part and repudiate it in part. *Southern Ecp. Co. vs. Palmer*, 48 Ga., 85; *Widner vs. Lane*, 14 Mich., 124; *Henderson vs. Cummings*, 44 Ill., 325; *Kreder vs. Trustees, etc.*, 31 Ia. 547; *Menkins vs. Watson*, 27 Mo., 163; *Saveland vs. Green*, 40 Wis., 431; *Tasker vs. Kenton Ins. Co.*, 59 N. H., 438; *Strasser vs. Conklin*, 54 Wis., 102.

§ 16. **Permitting One to Hold Himself Out.**—If the jury believe, from the evidence, that at the time the contract in question is alleged to have been made, the defendants knew that the said A. B. was doing business and buying stock in their names, as their agent, and made no objection to his so doing, then the defendants would be bound by any contract within the apparent scope of such business, and no secret arrangement between the defendants and the said A. B. would be binding on the plaintiff, unless he had notice of the same.

You are instructed, that if a person knowingly and voluntarily permit another to hold himself out to the world as his agent, he will be held to adopt his acts, and be bound, as principal, to the person who gives credit to the one acting as such agent. *Thurber vs. Anderson*, 88 Ill., 167.

If you believe, from the evidence, that in the summer of, etc., the defendants knew that A. B. was acting as their agent, buying stock in their names, and voluntarily permitted him to do so, and you further believe, from the evidence, that the said A. B., while so acting, made the contract alleged in plaintiff's declaration, then the defendants would be bound thereby,

whether the said A. B. was, in fact, their agent at that time or not.

§ 17. **Agent Personally Liable.**—If the jury believe, from the evidence, that the defendant employed the plaintiff to do the work in question, and that the plaintiff did the work under such contract, and also that the defendant was then acting as the agent of another in procuring said work to be done, still, if the jury further believe, from the evidence, that when the plaintiff was so hired to do the work, the defendant did not disclose the fact that he was acting as such agent, and the plaintiff then had no notice or knowledge of such agency, then the defendant will be liable to pay the plaintiff for such labor.

§ 18. **Notice to an Agent Binding, When.**—The jury are instructed, that notice to an agent of any fact concerning the matters of his agency, is the same as notice to the principal. The law presumes that an agent transmits, or in some manner, communicates, to his principal all information received by him relating to the matter of his agency. *Saulsbury vs. Wimberly*, 60 Ga., 78; *Roach vs. Carr*, 18 Kans., 329; *Taggs vs. Tenn. M. Bk.*, 9 Heisk., 479.

Notice to Agent, not Binding, When.—The jury are instructed, that a party is not chargeable with notice of facts within the knowledge of his agent or attorney, where the agent or attorney acquires such knowledge while acting as the agent or attorney of another person. *Harrington vs. McCollum*, 73 Ill., 476; *Aultman & T. Co., vs. Webber*, 4 Ill. App., 427.

§ 19. **Good Faith Required of the Agent.**—The court instructs the jury, as a matter of law, that if an agent makes any profit, in the course of his agency, by any concealed management, in either buying or selling, or other transaction, on account of the principal, the profits will belong exclusively to the principal. *Cottom vs. Holliday*, 59 Ill., 176; *Love et al. vs. Hoss*, 62 Ind., 255.

If you believe, from the evidence, that the defendant, A. B., was the agent of the plaintiff in making the purchase of

the (*land*) in question, and that as such agent he purchased the (*land*) for (*twelve*) dollars per acre, for plaintiff, and charged the plaintiff (*fifteen*) dollars per acre, representing to the plaintiff that he was compelled to pay that price for the (*land*), and received that amount of money from the plaintiff on that account, and that the plaintiff, when he paid the money, was ignorant of the price actually paid by defendant, then the plaintiff is entitled to your verdict for the difference between the price of the (*land*) at (*twelve*) dollars per acre and its price at (*fifteen*) dollars per acre, and interest on that sum at (*six*) per cent. per annum, from the time the money was so paid by the plaintiff.

§ 20. **Corporations only Act by Agents.**—The court instructs the jury, that corporations can only act or contract by their officers or agents, and when a corporation holds certain persons out to the public as authorized to act on its behalf, then the corporation, like an individual, will be bound by all the acts and contracts of such persons, which are done or made within the apparent scope of their said agency.

And if you believe, from the evidence in this case, that the defendant corporation appointed F., B. and H. as a building committee, or voluntarily and knowingly held them, or any of them, out to the public as such building committee, and as authorized to act and make contracts on its behalf, in relation to doing the work in question in this case, and that they did make the contract with the plaintiff for doing the work in question, then the corporation will be bound by the terms of such contract.

§ 21. **Corporation May Ratify Unauthorized Acts.**—A corporation, like an individual, may be bound by the acts of one assuming to act as its agents, if it ratify the acts of the person so professing to act as agent.

Although you may believe, from the evidence, that the plaintiff performed the services in question, for the defendant, at the request of some officer or member of the corporation not previously authorized to contract in reference thereto, still, if you further believe, from the evidence, that the work in question was prosecuted with the knowledge and consent of

the officers and agents of the corporation having charge and control of its property and affairs, and that the corporation accepted and held the benefits arising from such labor and services, then, as a matter of law, the corporation will be held to have ratified the acts of such unauthorized person, and it will be bound thereby.

§ 22. **Individual Members of Board Cannot Act.**—The supervisors have no power to act individually; it is only when convened and acting together as a board of supervisors that they represent and bind the county by their acts; and the chairman of the board has no greater authority, in his individual capacity, than any other member.

When the officers or agents of a public corporation have no power with respect to a given matter, neither their acts nor their individual knowledge in respect to the matter can, in any way, bind or affect such corporation. *Johnson vs. S. Dist.*, 67 Mo., 319.

Individual members of a corporation cannot, unless authorized, bind the body by express promises; hence it follows that a corporate engagement cannot be implied from their unsanctioned conduct or their declarations. *Benton vs. Bd. of Sups.*, 84 Ill., 384; *Harrison vs. Liston Dist.*, 47 Ia., 11.

The members of the county court can only bind their county, in matters of claims, when acting as a court, and their records are the only admissible evidence of their judicial acts. *McLaney vs. Co. of Marion*, 77 Ill., 488.

CHAPTER V.

ALTERATION OF WRITTEN INSTRUMENTS.

- Sec. 1. Material alteration renders instrument void.
2. Not affected by immaterial alteration.
 3. Alteration by stranger.
 4. Alteration by party not authorized.
 5. Alteration adopted by maker.
 6. Presumed to be made after execution.
 7. No presumption of law as to when alteration was made.

§ 1. **Material Alteration Renders Instrument Void.**—The court instructs the jury, that any material alteration in the terms of a promissory note, after it has once been made and delivered, will render the note void as against all the parties to the note, who did not know of and consent to the alteration at the time it was made, or unless such persons have in some manner subsequently ratified the act. *Schnewind vs. Hacket*, 54 Ind., 248; *Dickerman vs. Miner*, 43 Ia., 508; *Evans vs. Foreman*, 60 Mo., 449; *Bradley vs. Mann*, 37 Mich., 1; *Greenfield S. Bk. vs. Stowell*, 123 Mass., 196; *Hewins vs. Cargill*, 67 Me., 554; *Brown vs. Straw*, 6 Neb., 536; *Fuller vs. Green*, 64 Wis., 159.

The court instructs the jury that if they believe from the evidence, that the words "after maturity," have been erased in the note since the defendant A. B. signed it, without his knowledge or consent; this would be a material alteration of the note, and if done by any person then holding the note as owner or by any one authorized by the owner to do so, would render the note void as against the defendant A. B., although the jury may believe from the evidence that the owner took the note in the regular course of business before due, for value and without notice of such alteration, unless the jury further believe from the evidence that the said A. B., has in some manner ratified the said act as explained in these instructions upon that point. *Holmes vs. Turmper*, 22 Mich., 427; *McCoy vs. Lockwood*, 71 Ind., 319.

If the jury believe from the evidence that the defendant H. signed the note in question, as a surety for the other makers of the note, and that, after he had so signed it, by an arrangement between the other makers of the note and the holder (the rate of interest was changed from six per cent. to seven) without the knowledge or consent of the said H., such an alteration was a material one, and releases the said H. from all liability on the note, although such alteration was made without any fraudulent intent on the part of those who made it. (If proper, add clause as to ratification.) *Harsh et al. vs. Klepper*, 28 Ohio St., 200; *Coburn vs. Webb*, 56 Ind., 96; *Draper vs. Wood*, 112 Mass., 315.

If the jury believe from the evidence that since the defendant signed his name to the note in question, the same has been altered without the defendant's knowledge or consent, by adding the words, etc.—then the said note is void as to him, unless the jury believe from the evidence that the defendant has in some manner since the alteration was made ratified the same, as explained in these instructions upon this point. *Hamilton vs. Hooper*, 46 Ia., 515.

If the jury believe from the evidence that the (paper) read in evidence by the plaintiff was changed or altered, by inserting the words, etc.—by the plaintiff or by any one acting for him with his consent, but without the consent of the defendant, after it was delivered to the plaintiff, then the jury should entirely disregard such (paper) as evidence in the case—unless the jury further believe from the evidence that the defendant has in some way ratified the alteration since it was made.

And in determining whether such change or alteration has been made, the jury may take into consideration the appearance of the paper, the statement of the witnesses, as well as any and all other evidence of any fact or circumstance proved in the case, tending to throw any light upon that question. *Comstock vs. Smith*, 26 Mich., 300.

§ 2. **Not Affected by Immaterial Alteration.**—The jury are instructed, that it is not every alteration in a written instrument which will render it void against the maker, when done without his consent; to have that effect the alteration must be a material one, so as to change the terms of the instru-

ment; and in this case, although the jury may believe from the evidence that the note in question, since it was made and delivered, and without the consent of the defendant, has been changed by erasing the words, etc.—and inserting, etc.—still this would not be a material alteration, and would in no manner affect the liability of the defendant thereon. *Burnham vs. Ayer*, 35 N. H. 351.

§ 3. **Alteration by a Stranger.**—The jury are instructed, that the alteration of a written instrument by a stranger to it, that is, by a person who is not the owner of it, and who claims no interest under it, if done without the authority, consent or knowledge of the owner or person interested in it, does not render the instrument void, but the parties to it and those claiming under them are still bound by its terms as originally written. *Brooks vs. Allen*, 62 Ind., 400; *U. S. Bk. vs. Roberts*, 45 Wis., 373.

§ 4. **Alteration by Party not Authorized.**—If a person professing to act as the agent of the holder or owner of a note makes an alteration in it supposing he has authority to do so, when in fact he has no such authority, then such alteration does not render the note void. It will still be a subsisting obligation according to its terms as originally written.

And in this case if the jury believe from the evidence that the note in question was taken by the said A. B. as the agent of C. D., this fact alone would not give him any authority to alter the note, after he had received it from the defendant; and if the jury further believe from the evidence that the said A. B. after he had received said note did alter the same by erasing the words “after maturity” without the knowledge or consent of the defendant, this would not affect the plaintiff's right of recovery on the note as originally written, provided the jury further believe from the evidence that such alteration was made without the knowledge or consent of the said C. D. while he was the owner of the note. *Brooks vs. Allen*, 62 Ind., 400.

That one who has been entrusted with a promissory note by the maker to negotiate it has no implied authority to make an alteration of any material stipulation expressed in the instru-

ment; and it can make no difference whether an alteration is favorable or unfavorable to the maker of the note; if made without his knowledge or consent it renders the note void as to him. *Coburn vs. Webb*, 56 Ind., 96; *Lemay vs. Williams*, 32 Ark., 166; *Hamilton vs. Hooper*, 46 Ia., 515; *Greenfield Sav. Bk. vs. Stowell*, 123 Mass., 196; *Hewins vs. Cargill*, 67 Me., 554; *Aldrich vs. Smith*, 37 Mich., 468.

§ 5. **Alteration Adopted by Maker.**—Although the jury may believe, from the evidence, that since the note was made and delivered, it has been altered by striking out the words, etc.,—and inserting the words, etc.,—still, if the jury further believe, from the evidence, that since the said alteration was made, and with full knowledge of all the facts, the defendant has promised to pay it, then he will be deemed to have adopted the alteration, and will be bound to the same extent as though the alteration had been made before the note was delivered. *Goodspeed vs. Cutler*, 75 Ill., 534; *Evans vs. Foreman*, 60 Mo., 449; *Stewart vs. First N. Bk.*, 40 Mich., 348; *Kilkelly vs. Martin*, 34 Wis., 535; *Prouty vs. Wilson*, 123 Mass., 297.

NOTE.—Upon the question, whether the law presumes an evident alteration or interlineation, in a written instrument, to have been made before or after execution, the authorities are in conflict. 2 Pars. on Cont., 722, and Note y.

§ 6. **Presumed to be Made after Execution.**—The court instructs the jury, that all material interlineations in a deed are presumed to have been made after the execution of the same, and they render the deed void, unless they are explained by the party claiming the benefit thereof; and in this case the jury will consider the deed purporting to be executed by J. S. to C., and read in evidence by the defendant, as void and worthless, unless they believe, from the evidence, and from the appearance of the deed, that the interlineations or erasures in question, were made before or at the time of the execution and delivery of the deed, or with the consent of the maker thereof. *Montag vs. Linn*, 23 Ill., 551; 2 Pars. on Cont., 721.

§ 7. **No Presumption of Law as to When Alteration Was Made.**—Where an instrument offered in evidence has the appear-

ance of having been altered, as when a portion of it is in different ink, or handwriting, from the other portions, the law raises no presumption as to when the change was made, or by whom; but these are questions of fact to be found by the jury; and in determining these questions the jury should look at the instrument itself, as well as to all the circumstances in evidence, for an explanation, and thus determine whether the alteration was before or after the execution of the instrument, and with or without the consent of the maker. *Milliken vs. Marlin*, 66 Ill., 13.

In this case the parties have both introduced evidence tending to show when the alleged alteration (or erasure) in the deed from A. to B. was made, and in such cases the burden of proof is upon (the party offering the deed) to show by a preponderance of evidence that the alleged alteration (or erasure) if one has been made, was made before the deed was delivered; and if the jury believe, from the evidence, that the deed in question has been altered by, etc., then, unless (the party) has shown by a preponderance of evidence that such alteration was made before or at the time the deed was delivered, then such alteration renders the deed void, and the jury should find, etc. *Willett vs. Shepard*, 34 Mich., 106; *Tyree vs. Rives*, 57 Ala., 173; *Haynes vs. Haynes*, 33 Ohio St., 598.

CHAPTER VI.

APPLICATION OF PAYMENTS.

- Sec. 1. Debtor may direct, if he does not, creditor may.
2. When neither do, then the law will.

§ 1. Debtor May Direct, If He Does Not, Creditor May.—The jury are instructed, that the rule of law is, that a debtor, owing his creditor money on distinct accounts which are all due, may direct his payments to be applied upon either debt, as he pleases. If the debtor makes no such appropriation, then the creditor may apply the money as he sees fit; and if neither party make a specific appropriation of the money, the law will appropriate it as the justice and equity of the case may require. 2 Parsons on Cont., 629; *Bonnell vs. Wilder*, 67 Ill., 327; *Whittaker vs. Grover*, 54 Ga., 174; *Jones vs. Williams*, 39 Wis., 300; *Mich. A. Ry. Co. vs. Mellen*, 44 Mich., 321.

Where one person is indebted to another upon different accounts, or for different debts, and the debtor makes a payment, he has a right to direct upon which debt the payment shall be applied, and if he does so direct the payment, the creditor must apply the payment as directed. *Miles vs. Ogden*, 54 Wis., 573.

A debtor, paying money to his creditor, has a right to direct now it shall be applied, and the creditor has no right to disregard the directions of the debtor in that respect. When the debtor directs the application of money at the time of payment, such application can not be changed by the creditor without the consent of the debtor. *Jackson vs. Bailey*, 12 Ill., 159. *Detroit H. & S. W. R. Co. vs. Smith*, 50 Mich., 112.

If you believe, from the evidence, that at the time of the alleged payments the defendant owed the plaintiff upon two different accounts, both of which were due, and that the defendant made payments to the plaintiff without designating the debts to which such payments should be applied, then the

plaintiff had the right to make the application to such debt as he saw fit. *Bean vs. Brown*, 54 N. H., 395.

§ 2. When Neither the Creditor nor the Debtor Makes an Application of the Payment, Then the Law Will Make It.—When a creditor holds two debts against another, and one is secured and the other not, and payments have been made by the debtor, and there is no evidence that he directed their application, and no evidence of how they were applied, the law will presume they were credited on the debt for which there was no security. *Hare vs. Stegall*, 60 Ill., 380.

When a debtor owes a creditor several debts, and makes payments, he has a right to direct their application to any one or more of the debts, as he may choose; but if he makes payments and gives no directions, then the creditor may apply them as he may choose. When such payments are made, and neither party makes the application, the law will apply them in the manner most advantageous to the creditor. *Harman vs. Engleman*, 49 Wis., 278; *Langdon vs. Bowen*, 46 Vt., 512.

And if you further believe, from the evidence, that neither the plaintiff nor the defendant made any specific application of the payments, then the law will apply the payments upon that debt which was first due in point of time. *Sprague et al. vs. Hazenwinkle*, 53 Ill., 419; *Allen vs. Brown*, 39 Ia., 330; *Mills vs. Saunder*, 4 Neb., 190; *Northly vs. Emmerson*, 16 Mass., 374; *St. Albans vs. Fairley*, 46 Vt., 448.

CHAPTER VII.

ATTACHMENT—PLEA TRAVERSING AFFIDAVIT.

SEC. 1. Non-residence.

2. About to depart from the State, etc.
3. What is not a departing from the State.
4. About to depart from the State, how proved.
5. Intent to depart, how shown.
6. Attachment on the ground of fraud.

§ 1. **Non-resident of the State.**—If the jury believe, from the evidence, that the defendant, G. W. N., has not maintained a residence in the State of Illinois previous, and did not reside in this state at the issuing of the attachment in this case, according to the legal interpretation of the word, as laid down in these instructions; that he had no fixed place of abode or habitation; that he never kept house in M—; that he spent only a portion of his time in Illinois; that his family was divided, unsettled and constantly moving about, part of the time in Illinois and part of the time at some place or places in some of the eastern states, then the defendant was not a resident of the State of Illinois in the true intent and meaning of the statute, and they will find for the plaintiff. *Pullian vs. Nelson*, 28 Ill., 112. See Residence and Domicile.

§ 2. **About to Depart from the State, etc.**—The court instructs the jury that the burden of proof is upon the plaintiff to establish, affirmatively, that the defendant was about to depart from the state, with the intention of removing his effects therefrom, at the date of the affidavit in question; and that a failure to establish, by a preponderance of proof, either the intention to remove from the state, or his intention to remove his property from the state, will entitle the defendant to a verdict. *Hawkins vs. Albright*, 70 Ill., 87; *Coston vs. Paige*, 9 Ohio St., 397; *Hermann vs. Amedu*, 30 La. Ann., 393.

The court instructs you, that in order to sustain an attach-

ment on the ground that the debtor is about to depart from the state, with the intention of having his effects removed from this state, it must appear from the evidence :

1st. That the debtor was about to depart from the state; and, 2d, that such departure was with the intention of having his effects removed from the state.

§ 3. **What is Not a Departing from the State.**—That to authorize the issuing of an attachment against the property of a person, it is not enough that such person has expressed an intention of removing from the state at some future time, but the jury must believe, from the evidence, that the person was, at the time of the issuing of the attachment writ, then about to depart from the state. And in this case, unless the jury believe, from the evidence, that the defendant, at the time the affidavit in question was made, was then about to remove from the state, with the intention of having his effects removed therefrom, they should find for the defendant.

The court instructs you that the simple fact of a debtor preparing to depart from the state, with the intention of removing a portion of his effects therefrom, is not of itself a sufficient ground to sustain an attachment; provided you believe, from the evidence, that there would remain other property of the debtor in this state sufficient to pay his debts, and that there was no intention to withhold the payment of the debt upon which this suit is brought.

§ 4. **About to Depart from the State—How Proved.**—The jury are instructed that, in order to sustain the attachment writ in this case, it is not necessary for the plaintiff to prove that the defendant was about to remove from the state on the very day the suit was begun; it is sufficient, if it appears from the evidence, that the defendant was intending to leave the state, with his property, within so short a time that it would prevent the plaintiff from collecting his debt by an ordinary suit at law.

You are instructed that if you believe, from the evidence, that the defendant, at the date of the suing out of the writ of attachment, was about to depart from this state, with the in-

tention of having his effects removed from this state, then you should find the issue, as to the truth of the affidavit, in favor of the plaintiff.

If you believe from the evidence that at the time the attachment writ in this case was sued out the defendant had property in * * * county in this state sufficient to satisfy the amount of all indebtedness owing by him, which was liable to execution, and which the defendant was not about to remove from the state, and which might have been discovered and reached by the plaintiff by the exercise of reasonable diligence, to satisfy any judgment which the creditors of the defendant might obtain against him, then, as a matter of law, you should find that defendant was not about to remove his property from this state, etc.

If you believe from the evidence that at the time when the affidavit in question was made by the plaintiff, defendant was indebted to plaintiff, and that defendant had departed from this state with the intention of having his effects removed from this state, or that he was about to depart from this state with the intention of having his effects removed from this state, to the injury of the plaintiffs, and that such removal, if accomplished, would have been an injury to the plaintiffs, then you should find the issue upon the attachment affidavit in favor of the plaintiffs.

§ 5. Intent to Depart—How Shown.—The jury are instructed, that the intention of the defendant regarding his alleged intention to remove, and whether in fact he was about to remove himself or his property or effects from this state, to the injury of the plaintiff, may be inferred from all the circumstances given in evidence, including his declarations and his conduct so far as they appear in evidence and have any bearing upon those points—in other words, his intentions, and whether he was about to carry out such intentions, may be ascertained by you from all the various circumstances from which reasonable men in the everyday concerns of life judge of each other's intentions, so far as these various circumstances are shown by the evidence.

You are further instructed, that a party's intention to depart from the state, and to remove his property therefrom,

can only be shown by his acts and statements, and a party will be presumed to have intended what such acts and statements fairly and reasonably imply.

And in this case, if you believe, from the evidence, that the acts and statements of the defendant, at and about the time the affidavit in question was made, were such as fairly and reasonably showed an intention on his part, at that time, to remove from the state, with the intention of having his effects removed therefrom, to the injury of his creditors, you should find for the plaintiff.

§ 6. **Attachment on the Ground of Fraud.**—That the only issue for the jury to try is the one formed upon the affidavit in attachment; and that is, whether or not, at the time the attachment writ was sued out, the defendant was about to fraudulently assign, conceal, or otherwise dispose of his property, so as to hinder or delay his creditors in the collection of their debts. *McCrosky vs. Leach*, 63 Ill., 61; *Miller vs. McNair*, 65 Wis., 452; *Davison vs. Hackett*, 49 Wis., 186.

The fraud, as alleged, is one of the substantial charges made by the plaintiff in the affidavit, and it must be proved by a preponderance of the evidence, as the law never presumes fraud without evidence tending to show it. And, although you may believe, from the evidence, that the defendant was then about to assign and dispose of portions of his property, still, unless the plaintiff has proved, by a preponderance of the evidence, the fraudulent intent, as charged in the affidavit, you should find the issues for the defendant. *Lord vs. Defendorf*, 54 Wis., 496.

The law presumes that the business transactions of every man are done in good faith and for an honest purpose, and any one who alleges that such acts are done in bad faith, or for a dishonest purpose, takes upon himself the burden of showing, by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith. And in this case, before you would be warranted in finding a verdict for the plaintiff, upon the issue of the truth of the affidavit, you must believe, from the evidence, that the defendant, at the time the attachment writ was sued out, was about to fraudulently assign, conceal, or otherwise dispose of his property, so as to hinder or delay his creditors.

CHAPTER VIII.

DEBT ON BOND.

- SEC. 1. Presumption from proof of signature.
2. Sureties bound by action of principal.
3. Extent of agent's authority.
4. What proved by the record.

NOTE.—Suit on replevin bond given to the coroner.—Property replevied from the sheriff, who held it on writ of attachment—*Plea, non est factum*—Defence by the sureties, that they signed the bond in blank.

§ 1. **Presumption from Proof of Signature.**—The court instructs the jury, that if they believe, from the evidence, that the signatures to the replevin bond introduced in evidence in this case, are the genuine signatures of the defendants, then, if there is no proof to the contrary, the presumption of law is, that the said bond was signed and sealed by the defendants, after the body of the bond was filled up, as it now appears to be; and that it was regularly and properly delivered to the plaintiff, as coroner, in its present condition, and that all the defendants intended it should be so delivered.

If you believe, from the evidence, that the defendants signed the said replevin bond, with a blank space left in it for the insertion of the penalty of said bond, knowing of such blank space, and then delivered the same so signed to T. E., or to his agent, with the intention that the said blank should be filled, so as to make the bond an apparently perfect instrument, and that the same should then be delivered to the said plaintiff as a replevin bond in said case, and that it was thereafter presented to the plaintiff, and accepted by him without any notice, or knowledge on his part, that the same was signed with the amount of the penalty in blank, and that the plaintiff then had no knowledge or notice in respect to said bond, beyond what now appears upon the face of it, then you are instructed that said bond is valid and binding upon the said defendants, and to the same extent that it would

have been if the said penalty had been written in, as the same now appears, before the said defendants signed the same. *Smith vs. Crooker*, 5 Mass., 538; *State vs. Young et al.*, 23 Minn., 551; *Inhabitants of S. Berwick vs. Huntress*, 53 Me., 89; *Pepper vs. State*, 22 Ind., 399.

If you believe, from the evidence, that the signatures to the bond sued on in this case, are the genuine signatures of the defendants, then, before any question of law can arise as to any alleged signing of the same in blank, the burden of proof is upon the defendants to prove, by a preponderance of evidence, that it was signed by them while there were blank spaces in said bond not filled, as the same now appear; and in such case, unless the defendants have shown, by a preponderance of evidence, that the said bond was signed by them while there were such blank spaces unfilled, then, upon that question, you should find in favor of the plaintiff.

§ 2. **Sureties Bound by Action of their Principal.**—Where the sureties on a bond entrust it to their principal in an unfinished condition, it will be presumed that they intend to vest him with authority to perfect the bond, and to add other sureties sufficient to secure its approval; and such authority is a continuing authority until some step is taken by the sureties towards its revocation. *Cawley, etc., vs. The People*, 95 Ill., 249; *Dair vs. United States*, 16 Wall., 1.

If you believe, from the evidence, that the defendants, who are sued as sureties in this case, signed the bond upon which this suit is brought, while there was no writing in the body of the paper above their signatures, but a mere printed form, with blank spaces left for the amount of the penalty and other appropriate matters to make the same a perfect replevin bond, they then knowing of such blank spaces; and that after they had so signed the same, they delivered it to the said T. E., or to his agent, with the understanding that such blank spaces would be filled, so as to make it a perfect replevin bond, and that it then would be delivered to the plaintiff, and that said blank spaces were afterwards filled by the said T. E., his agent or attorney, as they now appear; and that said bond was afterwards presented to and accepted by the plaintiff as a replevin bond in said case, then the bond is valid and binding on the

defendants, no matter what was the understanding of the parties at the time the defendants signed the same; provided you further believe, from the evidence, that the plaintiff when he accepted said bond, had no notice or knowledge of such understanding or arrangement, or that the said bond had been filled up otherwise than in accordance therewith. *City of Chicago vs. Gage*, 95 Ill., 593; *Smith vs. Crooker*, 5 Mass., 583.

If you believe, from the evidence, that the said defendants, or either of them, signed said bond while there was a blank, left in it for the insertion of a penalty, and then delivered the same to the witness A. E., as the agent of the said T. E., for procuring said bond, with the understanding or agreement on his part that the said blank should only be filled with a penalty of four thousand dollars, and the said A. E., or the said T. E., afterwards filled the said blank, or caused it to be filled, with a penalty of eight thousand dollars; and if you further believe, from the evidence, that the said bond was afterwards presented to and accepted by the plaintiff as the replevin bond in that case, without any notice or knowledge on his part of such agreement or understanding, and without any notice or knowledge in respect thereto, then the said bond is as valid and binding in the hands of the plaintiff as though no such agreement or understanding had been made or had. *City of Chicago vs. Gage*, 95 Ill., 593; *Butler v. U. S.*, 21 Wall, 272; *Wright vs. Harris*, 31 Ia., 272; *State vs. Pepper*, 31 Ind., 76.

The court instructs you, that although they may believe, from the evidence, that the name of the defendant M. was written into the body of the bond, and also signed to the same, after it had been signed by the other parties thereto, and after it had been shown to the plaintiff, these facts alone would not render said bond invalid as to such other parties; provided you further believe, from the evidence, that said name was written in and signed to said bond before the same was accepted and approved by the plaintiff, as the replevin bond in the case mentioned therein.

You are instructed, that when the sureties on a bond sign it in blank, and deliver it in that condition to the principal, knowing, or having reason to know, that the principal intends

to fill the blanks and deliver the same to the obligee, for the purpose of obtaining possession of property on the faith of the bond, and the principal afterwards fills the blanks, delivers the bond, and obtains the property, then the law will presume that the sureties authorized the principal to fill the blanks, and the sureties will be bound by the acts of the principal to the same extent that they would be bound, had the blanks been filled before the said bond was signed by them; provided, the person receiving the bond, at the time he received it, had no notice or knowledge that the blanks in the bond were filled up otherwise than in accordance with the instructions or understanding of the sureties. *Butler vs. United States*, 21 Wall., 272; *Bartlett vs. The Board of, etc.*, 59 Ill., 364; *Peper vs. State*, 22 Ind., 399; *City of Chicago vs. Gage*, 95 Ill., 593; *McCormick vs. Bay City*, 23 Mich., 457; *State vs. Young*, 23 Minn., 551.

Where the surety in a bond signs it and delivers it to the principal, with the understanding that the principal shall procure others to sign the bond, before delivering it to the obligee, and that after procuring such signatures, he may deliver it, and the principal delivers the bond to the obligee without procuring the signatures, the obligee, in absence of notice to the contrary, has a right to presume that the principal was authorized to deliver the bond in the condition in which it was delivered. *Smith vs. The Board of Supervisors*, 59 Ill., 412.

§ 3. **Extent of Agent's Authority.**—That a special agent's authority is that which is given by the terms of his appointment, or that with which he is apparently clothed by the character in which he is held out to the world by the principal. The principal is equally bound by the authority which he actually gives, and by that which, by his own acts, he appears to give; and when one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss must bear it.

§ 4. **What Proved by the Record.**—The court instructs the jury, that the certified copy of the record of judgment in the replevin case of *J. E. vs. T. M. R. and others*, is sufficient evidence that the said J. E. did not prosecute that suit with

effect, and that a return of the property replevied in that case was awarded by the court to the defendants in that suit.

If you believe, from the evidence, and under the instruction of the court, that the bond sued on in this case was a valid and binding bond upon the defendants, and that the property mentioned and described in the declaration in the replevin suit of *J. E. vs. T. M. B. and others*, was not returned to the defendants in that suit, or to any of them, before the commencement of this suit, then you should find the issues in this suit in favor of the plaintiff.

CHAPTER IX.

DELIVERY OF DEEDS.

- SEC. 1. Deed takes effect from time of delivery.
2. What constitutes delivery.
3. No particular form or ceremony necessary.
4. Official bond—Delivery.

§ 1. **Deed Takes Effect from Time of Delivery.**—The court instructs the jury, that when the date of a deed and the delivery are different, a deed of real estate takes effect from the date of its delivery, and not from the date of the deed. 3 Washburn R. E., 257.

§ 2. **What Constitutes Delivery.**—To constitute a delivery of a deed the person who makes the deed must not only part with the possession of it, but he must part with the right to control it, and with the right to recall it. 3 Washburn R. E., 254.

And if you believe, from the evidence in this case, that the defendant executed the deed in question, sent it to the recorder's office, and had it recorded, and then received it back again into his possession, such fact alone would not constitute a delivery, and no title would pass until such deed was delivered to the grantee or to some one for him. *Watson v. Ryan*, 3 Tenn., Ch. 40; *Boufes vs. Schultze*, 2 Brad. (Ill. App.), 196.

§ 3. **No Particular Form or Ceremony Necessary.**—The court instructs the jury, that no particular form or ceremony is necessary to constitute a delivery of a deed. It may be by acts without words, or by words without acts, or by both; anything which clearly manifests the intention of the grantor and of the person to whom it is delivered, that the deed shall then become operative and effectual, that the grantor shall lose all control over it, and that by it the grantee is to become possessed of the estate, is a sufficient delivery. *Gunnell vs. Cockerill*, 79 Ill., 79; *Thatcher vs. St. Andrews Church*, 37 Mich., 264.

A deed may be delivered to a stranger, for the benefit of the grantee named in the deed, who may be ignorant at the time that the deed has been made, and if the grantee, when informed of the fact, assents to and accepts the conveyance, the deed will take effect, and vest the title in the grantee; unless the evidence shows that the rights of third parties have intervened in the meantime. *McPherson vs. Featherstone et al.*, 37 Wis., 632; *Concord Bank vs. Bellis*, 10 Cush., 276.

The question of the delivery of a deed is one of act and intent both; the fact that a deed passes from the hands of the grantor to the grantee, if proved, is not necessarily a delivery of the deed, within the meaning of the law. To constitute a delivery, it must be delivered by the grantor and accepted by the grantee, or by some one authorized by him, with the intention that it shall then be an operative instrument, according to its terms. *Steele vs. Miller*, 40 Ia., 402; *Stiles vs. Probst*, 69 Ill., 362.

You are instructed, that the delivery of a deed need not necessarily be made to the grantee himself. If made to any person for the grantee, and it is absolute and unconditional and it appears to be for the grantee's benefit, his assent to the delivery will be presumed. *Thomas vs. Candor*, 60 Ill., 244.

§ 4. **Official Bond, How Delivered and Accepted.**—The jury are instructed, that the delivery of a bond (*of county treasurer*) is not complete until it is accepted and approved by the board of supervisors. The bond can only be accepted or rejected by the board, as an organized body; the power cannot be delegated. *Cawley vs. The People*, 95 Ill., 249.

CHAPTER X.

CARRIERS OF GOODS.

- SEC. 1. Who is a common carrier of goods.
2. Liability of carrier for goods.
3. The law of the State where the goods are to be delivered, governs.
4. Liability for all losses except by the act of God, etc.
5. What is meant by the act of God.
6. What is not an act of God.
7. Inevitable accident, what.
8. Must use reasonable care to avoid injury by act of God, etc.
9. Written receipt not required.
10. Line made up of several carriers.
11. First carrier liable, when (Illinois).
12. When liability of carrier commences.
13. Liability continues how long.
14. If goods are not delivered to consignee, they must be stored.
15. Railroad companies are not bound to deliver to consignee personally.
16. Express companies, duty and liability.
17. Warehousemen, care required of.
18. What is ordinary diligence and care.
19. Must carry within a reasonable time.
20. Shipping perishable property.
21. Receipt, when *prima facie* evidence of goods in good order.
22. Bill of lading implies what—Contract.
23. Bill of lading, not conclusive of condition of goods.
24. Carrier does not insure condition of the goods.
25. Can restrict their common law liability only by special contract.
26. Legal duties imposed by law.
27. Exemption clause in receipt not binding.
28. Shipper will be presumed to agree to exemption clause, when.
29. Burden on the carrier to show loss within the exemption.
30. Liability not limited by notice.
31. Must exercise reasonable care to prevent loss within exemption.
32. Shipper bound by receipt, when.
33. Shipper not bound by notice printed on receipt.
34. Can not restrict liability arising from its own negligence.
35. Burden of proof.

NOTE.—In considering the following instructions, relating to common carriers, it must be borne in mind that their liabilities are regulated by statute in many of the states, and, consequently, they may not be the same in different states. It is more especially true as regards their right to limit their common law liability.

§ 1. **Who is a Common Carrier of Goods.**—The jury are instructed, that one who, for hire, carries passengers and their baggage, or baggage alone, for all persons choosing to employ him, from, to and between railroad depots and hotels, and other places in a city, is a common carrier of goods. *Parmelee vs. Lowitz*, 74 Ill., 116; 2 Am. and Eng. Enc., 781.

You are instructed, that express companies and railway companies are common carriers, and are liable as such; they are insurers for the safe delivery of the property intrusted to them for transportation; and they will not be excused for its non-delivery, except they are prevented from delivering it by an act of God, or the public enemy. Cooley on Torts, 640; Edws. on Bail, § 551; *Morrison vs. Davis*, 20 Penn. St., 171; *Railroad Co. vs. Reeves*, 10 Wall., 176; *Sherman vs. Welles*, 28 Barb., 403; *Langworthy vs. N. Y. & H. Ry. Co.*, 2 E. D. Smith, 195.

§ 2. **Liability of Common Carriers of Goods.**—The jury are instructed, that a common carrier of goods, who receives and undertakes to carry a trunk, for one not a passenger with such carrier, is responsible for the delivery of the trunk and its contents, as against everything but the act of God or the public enemies, notwithstanding they consist of articles not usually carried as baggage, unless the owner has been guilty of some fraud or deception in relation to the contents of said trunk. *Parmelee vs. Lowitz*, 74 Ill., 116.

§ 3. **The Law of the State where the Goods are Delivered, Governs.**—The jury are instructed, that when goods are delivered to a common carrier in this state, and marked to a particular place or destination, the carrier impliedly agrees to carry and deliver the goods at that place, although it may be beyond its own lines of carrying, unless there is some special contract relieving the carrier from such implied obligation. Cooley on Torts, 640; *Milwaukee, etc., Rd. vs. Smith*, 74 Ill., 197; *Bohannon vs. Hammond*, 42 Cal., 227; *McMillan vs. Mich., etc., Rd. Co.*, 16 Mich., 78.

§ 4. **Liable for all Loss, except by Act of God, etc.**—The court instructs the jury, that a common carrier is liable for all

losses of goods which do not arise from the act of God, or the public enemies; while a warehouseman is only liable for such losses as might have been guarded against by the exercise, on his part, of ordinary care and diligence. *St. L., A. & T. H. R. R. Co. vs. Montgomery*, 39 Ill., 335; *Red. Car.*, § 24, 25.

You are instructed, that where a common carrier undertakes to transport goods, he will be held liable for their loss or destruction, in the absence of a special contract in that behalf, unless the loss or destruction was caused by the act of God, or the public enemy.

§ 5. **What is Meant by Act of God.**—By the term, act of God, is meant superhuman—something beyond the power of man to foresee or guard against. It means inevitable accident—something that happens without the intervention of man. A loss by fire is not a loss by act of God. *Mer. Disp. Co. vs. Smith*, 76 Ill., 542; *Red. on Car.*, Sec. 24.

By the term, act of God, is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted; such as unexampled freshets, violent storms, lightning and frosts. For losses occurring by any of these means, a common carrier is not liable; provided, he has not been guilty of any want of ordinary and reasonable care to guard against such loss. *Michaels vs. N. Y. Cent., Rd. Co.*, 30 N. Y., 564; *Parker vs. Flag*, 26 Me., 181; *Moore vs. Mich. Rd.*, 3 Mich., 23; *Cox vs. Petterson*, 30 Ala., 608; *Chevallier vs. Straham*, 2 Tex., 115.

§ 6. **What is not an Act of God.**—If the jury believe, from the evidence, that the injury complained of could have been prevented by * * *, or by any other means known and recognized as suitable and proper for the purpose, then the injury was not produced by an act of God, within the meaning of the law. *Red. on Car.*, § 25.

§ 7. **Inevitable Accident, What.**—If the jury believe, from the evidence, that the injury complained of was the result of inevitable accident, then the jury should find for the defendant. And the jury are instructed, that the import and mean-

ing of the words "inevitable accident" is this: Where one is pursuing a lawful avocation in a lawful manner, and something occurs which no ordinary skill or precaution could foresee or prevent, and, as a consequence, the accident takes place, this is called inevitable accident. Red. on Car., etc., § 28.

§ 8. **Carrier Must Use Reasonable Care to Avoid Injury by Act of God.**—The jury are instructed, that a common carrier is bound to use reasonable care and diligence to prevent loss or injury to goods intrusted to it, by what are termed acts of God; that is, such care and diligence as ordinarily prudent men usually exercise towards their own property, under like circumstances; and if the carrier do not use such care and diligence, and loss or damage results therefrom, he will be liable therefor.

Whether, in this case, such care and diligence were or were not used by the defendant, and whether any loss resulted therefrom, are questions to be determined by the jury, in view of all the facts and circumstances proved on the trial. *Ill. Cent. Rd. Co. vs. McClellan*, 54 Ill., 58.

§ 9. **Written Receipt Not Required.**—The jury are instructed, that to charge a common carrier with the receipt of goods, it is not necessary that any written receipt should be given; provided, the jury believe from the evidence, that the property in question had actually come into the possession of the carrier, to be transported by it, and that it was afterwards lost or destroyed, as alleged in the declaration. *I. C. Rd. Co. vs. Smyser*, 38 Ill., 354; *Hickox vs. Nangatuck Rd.*, 31 Conn., 281; Red. on Car., etc., § 101.

§ 10. **Line Made up of Several Carriers.**—The jury are instructed, that under the bill of lading introduced in evidence in this case, the defendant was bound to transport the goods safely to the end of its route, loss from the act of God or the public enemies excepted, and then deliver them to (next carrier, etc.) and in such case the company would not be relieved from its liability as a common carrier by simply unloading the goods and storing them in a warehouse without delivery to the next carrier. Whether the defendant did unload and store the

goods or did, etc., are questions of fact to be determined by the jury, from the evidence. *Irish vs. Milwaukee Rd. Co.*, 19 Minn., 376; *Ætna Ins. Co. vs. Wheeler*, 49 N. Y., 616; *Dunson vs. N. Y., etc., R. Co.*, 3 Laws, 265.

The law is, that where goods are delivered to a carrier marked to a particular place beyond or not upon the line of such carrier and the goods are unaccompanied by any other direction for their transportation and delivery, then the carrier is only bound to transfer and deliver them according to the established usage of the business in which the carrier is engaged, whether that usage were known to that other party or not. Red. on Car., § 185; *Vansantvoord vs. St. John*, 6 Hill, 157; *F. & M. Bank vs. Champlain Trans. Co.*, 18 Vt., 140; *Converse vs. Norwich Trans. Co.*, 33 Conn., 166; *Montgomery, etc., Rd. Co. vs. Moore*, 51 Ala., 394; *Crawford vs. Southern Rd. Co.*, 51 Miss., 222.

That when parts of a continuous line or route of transportation are owned by different carriers, then, unless there is some contract expressed or implied to the contrary, each carrier is only liable for losses and injuries occurring on his own particular portion of the route. *Montgomery, etc., Rd. Co. vs. Moore*, 51 Ala., 394; *Ortt vs. M. & St. L. R. Co.*, 31 N. W. Rep., 519.

§ 11. **First Carrier Liable, When—(Illinois.)**—The court instructs the jury, that the rule in this state is, that when goods are delivered to a common carrier, in this state, marked to a place not upon or beyond its line of road, with no other direction, and without any express contract as to the place of delivery, the law will imply an undertaking, on the part of the carrier, to transport the goods to and deliver them at the place to which they are marked. *Milwaukee, etc., Rd. Co. vs. Smith*, 74 Ill., 197.

You are further instructed, that when there is no special contract to the contrary, and goods are lost by any one carrier in a line composed of several carriers, the first to whom the goods were delivered will be liable to the owner for the goods lost and the owner is not required to sue the carrier who actually lost the goods, provided you believe from the evidence that the first carrier either expressly or impliedly agreed to

carry the goods to their destination as explained in the instructions upon that point. *C. & N. W. Rd. Co. vs. N. Line P. Co.*, 70 Ill., 217.

You are instructed, as a matter of law, that where several carriers by agreement unite to complete a line of transportation, the freight to be divided between them in definite proportions, and one of them receives goods for one freight to be paid for the whole line and gives a through bill of lading, then each carrier is the agent of all the others, and each is liable for any damage done to the goods on whatever part of the line the damage is received; and, in this case, you are further instructed that the bill of lading introduced in evidence recites that the goods therein mentioned were received by the defendant corporation at C. to be carried to N. Y. (freight to be paid, etc.), and if you believe from the evidence that the defendant corporation at the time the goods were received had an arrangement or agreement (with the other common carriers) by which they were all to unite and form a completed line of transportation between C. and N. Y., each of the connecting companies to have an agreed or definite part of the freight as between themselves, then the defendant would be liable for any damage or loss happening to the goods on any part of the entire route. *Harp vs. The Grand Era*, 1 Woods, 184.

§ 12. **When the Liability of the Carrier Commences.**—The law is, that as soon as property is received into the exclusive possession of the common carrier, with its knowledge and consent, for the purpose of being shipped, then the liability of a common carrier commences, no matter whether it is received into a car, depot or warehouse. *Edwds. on Bail.*, § 528; *Coyle vs. Western, etc., Corp.*, 47 Barb., 152; *Barren vs. Eldridge*, 100 Mass., 455; *Michigan, etc., Rd. Co. vs. Schurtz*, 7 Mich., 515.

You are instructed, that the liability of a common carrier, for the safe delivery of property which has come into its possession, is the same, whether it was received directly from the owner or from another carrier, to whom it had been originally delivered. *Gulliver vs. Adams Ex. Co.*, 38 Ill., 503.

§ 13. **Liability Continues, How Long.**—The court instructs

the jury, that common carriers of goods must deliver the goods shipped by them to the owner or consignee at the point of destination, or store the goods, subject to the order of the consignee; and they cannot relieve themselves from their liabilities as common carriers until the goods are delivered to the owner or consignee, or till they are placed in a warehouse for safe keeping; and there must be some open, distinct act of delivery to a warehouse in order to change the liability from that of a common carrier to that of a warehouseman, and the proof of this change rests on the carrier. The liability of a common carrier will continue until a different liability attaches on the part of some one. *C. & R. I. Rd. Co. vs. Warren*, 16 Ill., 502; *Francis vs. D. & S. City Rd. Co.*, 25 Ia., 60.

NOTE.—The duty of railroad companies and other common carriers, in respect to notifying the consignee of the arrival of the goods, or of delivering to them personally, will be governed, to some extent, by custom and usage, and by the former course of dealing between the parties; and, perhaps, to some extent, by the circumstances of the case. Redfield on Carriers, secs. 104-106; *McMillen vs. Mich. Southern Rd. Co.*, 16 Mich., 79; *Buckley vs. G. W. Rd. Co.*, 18 Mich., 121.

Although you may believe from the evidence that the goods in question were safely carried by the defendant to S. and there unloaded and safely deposited in a reasonably safe warehouse and were afterwards burned (or stolen) without any negligence on the part of defendant, still the defendant would be liable as a common carrier for the loss of the goods as explained in the instructions upon that point, provided you further believe from the evidence that the goods were burned (or stolen) before the plaintiff had had notice of their arrival and before he could, by the use of ordinary and reasonable diligence, have learned of the arrival of the goods and have had a reasonable time in which to remove them. *Wood vs. Crocker*, 18 Wis., 345; *Ala. & Tenn. Rd. Co. vs. Kidd*, 35 Ala., 209; *McCartney vs. N. Y. & Erie Rd. Co.*, 30 Penn St., 247; *Moses vs. Boston & Me. Rd. Co.*, 32 N. H., 523; *Rome Rd. Co. vs. Sullivan*, 14 Ga., 277; Red. on Car., etc., § 9, 10.

If you believe from the evidence that the goods in question were carried by the defendant to C., and then unloaded from the cars and the plaintiff notified of their arrival, then it would be the duty of the plaintiff to pay the freight and

charges and remove the goods within a reasonable time thereafter; and if you further believe from the evidence that the plaintiff did not within a reasonable time after such notice offer to pay said freight and charges and take away the goods, and that the goods were afterwards burned (or stolen), then the defendant would not be responsible for the loss of the goods—provided you further believe from the evidence that the defendant was at the time exercising such care for the safety of the goods as an ordinarily prudent person would usually take of his own property under the same circumstances. Red. on Car., etc., § 109, 110.

§ 14. If Goods are not Delivered to Consignee, They Must be Stored.—If the jury believe, from the evidence, that the goods of the plaintiff were carried by the defendant to their destination, and not then and there delivered to the plaintiff, or to some one for him, by reason of there being no one there to receive them, or for any other cause not the fault of the plaintiff, then it was the duty of the defendant to store the goods in an ordinarily safe warehouse.

You are instructed, that it is the duty of a carrier of goods, when the goods have arrived at the place of destination, to unload and place them in a convenient place for delivery, and if the consignee is there ready to receive them, to deliver them to him; but if he is not there, the carrier must store them in a reasonably safe warehouse, or place them under the charge of competent and careful servants, ready to be delivered when called for by those entitled to receive them; and if the carrier fails to do this, and the goods are thereby lost or injured, the carrier will be liable to the owner for such loss or injury: *Cahn vs. Mich. Cent. Rd. Co.*, 71 Ill., 96. Red. on Car., etc., § 108; *Mechanic's Bank vs. Trans. Co.*, 23 Vt., 211; *New Albany & S. Rd. Co. vs. Campbell*, 12 Ind., 55.

If you believe, from the evidence, that the defendant received the goods of the plaintiff, to be transported by it, as charged in the declaration, then the responsibility of the defendant as a common carrier lasted until the plaintiff's goods reached their destination and were delivered to the plaintiff, or his authorized agent, or were, by the defendant, stored in an ordinarily safe warehouse of its own or some one else. •

§ 15. **Railroad Companies are not Bound to Deliver to Consignee Personally.**—The court instructs the jury, that railroad companies are not bound to deliver goods carried by them to the consignee personally. When the goods have reached their destination, and the consignee is not present to receive them, then the carrier may store them in a suitable warehouse, and when the goods are thus stored, the duty and liability of the company as a common carrier is terminated, and that of the warehouseman begins. *Cooley on Torts*, 642; *Chicago & A. Rd. Co. vs. Scott*, 42 Ill., 121; *Red. on Car.*, § 106.

§ 16. **Duty and Liability of Express Companies.**—That an express company, as a common carrier, is not only required to transport the goods to the place of destination, but the further duty is enjoined upon it to deliver the goods to the consignee, at his residence or place of business, if, with the exercise of reasonable care and efforts in that behalf, such residence or place of business can be found.

The court further instructs you that where goods transported by an express company are by it tendered to the consignee, and he fails to receive and pay for them, it is the duty of the express company to so notify the consignor, and when this is done, the company is relieved of its responsibility as a common carrier, and holds the goods as a warehouseman, subject to the order of the consignor, and not before.

The court further instructs you, as a matter of law, that an express company can discharge itself of responsibility, as a common carrier, in no other way than by an actual delivery of the goods to the proper person, at his residence or place of business, when, with reasonable efforts, these can be found, except by proving that the company has been excused from so doing, or prevented by an act of God, or the public enemy. *Am. Merchants U. Ex. Co. vs. Wolf*, 79 Ill., 430. *Red. Car.*, etc., § 61; *Stadhecker vs. Combs*, 9 Rich (S. C.), 193.

It is the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee, and the only way it can relieve itself from this responsibility is by showing performance, or its prevention by the act of God, or a public enemy. And in this case, if you believe, from the evidence, that the defendant, at

the time in question, was a common carrier, and as such received the money in question, to be carried and delivered to the plaintiff at K., and that the defendant delivered said money to one E., on a writing purporting to be an order of the plaintiff, and that said order was a forgery, then such delivery will not excuse the defendant, and the plaintiff is entitled to recover the amount of said money. *Am. M. U. Ex. Co. vs. Milk*, 73 Ill., 224.

§ 17. **Care required of Warehousemen.**—The jury are further instructed, that when the carrier assumes the duty of warehouseman, he is bound to use ordinary care and diligence in the preservation of the property. The building in which the goods are stored must be a reasonably safe one, and under the charge of careful and competent servants.

And if you further believe, from the evidence, that after the goods arrived at their destination, and after a reasonable time for the consignee to call for and receive the same, the defendant retained possession of them, such possession would be in the capacity of a warehousekeeper of goods for hire, and as such warehouseman, the defendant was bound to use all ordinary diligence and caution in the care of the same. *Edwd. on Bail.*, § 336; *Chic., R. I. & P. Rd. Co. vs. Fairclough*, 52 Ill., 106.

That the ordinary diligence or care which a warehouseman is bound to use, is that degree of care and attention which, under the same circumstances, a man of ordinary prudence and discretion would ordinarily use in reference to the particular goods, if they were his own property. *Mote vs. C. & N. W. Rd. Co.*, 27 Ia., 22; *Francis vs. D. & S. C. Rd. Co.*, 25 Ia., 60.

§ 18. **What is Ordinary Diligence and Care.**—That ordinary diligence is such diligence as men of common prudence usually exercise about their own affairs; and ordinary care is such care as an ordinarily prudent person usually takes of his own goods. *C. & A. Rd. Co. vs. Scott*, 42 Ill., 132.

A common carrier of goods is not an insurer as to the time at which the goods shall arrive at their destination but he is bound to carry them to their destination in a reasonable time.

after they are received. *McLaren vs. Detroit & C. R. Co.*, 23 Wis., 138; *Parsons vs. Hardy*, 14 Wend., 215.

If delay is occasioned by an inevitable accident or an act of God, and loss or damage results from such delay without any fault on the part of the carrier, such loss or damage is not chargeable to the carrier. *Nashville R. Co. vs. David*, 6 Heisk. (Tenn.), 261; *R. R. Co. vs. Reeves*, 10 Wall. (U. S.), 176; *Hoadley vs. N. T. Co.*, 115 Mass., 304.

If a carrier is transporting property of a perishable nature and a delay is occasioned by an inevitable accident or an act of God, he must use all reasonable efforts to avoid all unnecessary damage to the property either by forwarding it to its destination by other means of conveyance, or in some other way. If he is unable to forward it to its destination by the exercise of reasonable efforts in that behalf in time to avoid a total loss, he is justified in selling the property for the best price it will bring, exercising reasonable discretion in that regard; but, whether, in this case, there was any unusual delay in transporting the goods in question, and whether such delay, if any, was caused by inevitable accident, and whether the defendant did everything that could reasonably be done to avoid damage to the goods, are all questions of fact to be determined by the jury, from the evidence in the case. *Express Co. vs. Smith*, 33 Ohio. St., 511.

§ 19. **Must Carry within a Reasonable Time.**—The jury are instructed, that when a railroad company contracts to forward and deliver goods at any particular point it is bound to forward and deliver the goods at that point within a reasonable time, and it will not be released from its liability by delivery to another connecting road; but it will still be liable for any unreasonable delay, although the same occurs on account of the crowded condition of the connecting road, or for any other cause attributable to such road. *Penn. Rd. Co. vs. Benz*, 68 Penn. St., 272; *King vs. Macon, etc., Rd. Co.*, 60 Barb., 169; *Toledo, W. & W. R. R. Co. vs. Lockhart*, 71 Ill., 627.

§ 20. **Shipping Perishable Property.**—If the jury believe, from the evidence, that the fruit in question was injured and damaged by being frozen after it was received by the defend-

ant, and while in transit to C., and that carriers in the same line of business were at that time accustomed to use refrigerator cars for the purpose of protecting fruit from the effects of the weather, and that such injury or damage could have been prevented by the use of reasonable and ordinary care on the part of the defendant, either by shipping the same in refrigerator cars or by another means generally known and recognized among railroad men as suitable and proper for the purpose of protecting fruit from the effects of the weather, then the damage was not produced by an act of God, within the meaning of the law, and the defendant would be liable therefor.

You are instructed, as a matter of law, that where a common carrier accepts fruits liable to be affected by the weather for transportation over long distances, in the winter season, the character of his employment, independently of any special contract to that effect, clearly implies that he will ship them in such vehicles or cars as are reasonably suitable for the purpose, and exercise such care and diligence as may be reasonably necessary for their safe passage to their destination. Whether, in this case, such care and diligence were or were not used by the defendant, and whether any loss resulted therefrom, are questions to be determined by you in view of all the evidence in the case. *Merchants' Dispatch Trans. Co. vs. Comforth*, 3 Col., 280.

If you believe, from the evidence, that the defendant, by the exercise of reasonable diligence in the loading and shipment of the (oranges) mentioned in the bill of lading, could have transmitted the same to their destination in a sound and undamaged condition, and the jury further believe, from the evidence, that said (oranges), or any part thereof, arrived at their destination in a damaged and unsound condition by reason of the want of reasonable care and diligence on the part of the defendant and without any fault or neglect on the part of the plaintiff then you should find the issues in favor of the plaintiff.

The court instructs you as a matter of law that where goods are damaged while in the hands of a common carrier through the negligence of the carrier, if they are only damaged and are not rendered wholly worthless the owner is bound to receive

them and he cannot abandon them and proceed against the carrier as for total loss, but in such case the owner has a right of action against the carrier for the depreciation in the value of the goods occasioned by such damage and negligence provided no fault or negligence on the part of the plaintiff has contributed to such loss or damage. *Shaw vs. S. C. Ry. Co.*, 5 Rich., 462.

The court instructs you that the clause embodied in the bill of lading offered in evidence providing that the defendant should not be liable for any loss or injury to said fruit, which might occur by reason of the weather, would not relieve the defendant from any loss or damage from its negligence or want of ordinary care in providing suitable cars for the transportation of such fruit. Whether the defendant was guilty of negligence or want of ordinary care in not furnishing suitable cars for the transportation of such fruit, is a question to be determined by you from a consideration of all the evidence in the case.

§ 21. Receipt *Prima Facie* Evidence of Goods in Good Order.—That the receipt introduced in evidence is *prima facie* proof that the goods therein mentioned were in good order at the time they were received by the defendant, and so far as regards that question, the burden of proof is on the defendant to show, by a preponderance of evidence, that the goods were in a damaged condition at the time they were received by the defendant, or else that the injury occurred from a cause for which the defendant is not liable, as explained in these instructions; provided, the jury believe, from the evidence, that the goods were damaged when delivered to the plaintiff, as charged in the declaration. *Montgomery, etc., Rd. Co. vs. Moore*, 51 Ala., 394.

The bill of lading, introduced in evidence in this case, is *prima facie* evidence that the box of goods was received by the defendants, and was at that time in good order; and if the defendants claim that it was not so in good order, it is incumbent on them to show this, and that they were deceived or defrauded when the bill of lading was signed; and unless you believe, from the evidence, that the defendants were so deceived or defrauded, you will find a verdict for the plaintiff for the

amount of his loss, as shown by the evidence; provided that you find, from the evidence, that the plaintiff demanded said goods before the commencement of this suit, and that the goods were not delivered on demand, as charged in the plaintiff's declaration; and further, that said loss did not occur from (*causes excepted in the receipt*). *G. W. R. R. Co. vs. McDonald*, 18 Ill., 172; *Red on Car, etc.*, § 259, 247.

You are instructed that the bill of lading in this case shows, *prima facie*, that the goods in question were in good order and condition when they were received by the railroad company; and if you believe, from the evidence, that the goods were not in good order and condition—natural wear and tear and ordinary deterioration excepted—when delivered to the plaintiff, then to avoid liability for injury to the goods, defendants must show, by a preponderance of evidence, that the goods were not as described in the bill of lading at the time they were delivered, or that they were injured by some fault or negligence of the plaintiff, or by (*some cause within the exemption clause of the receipt*).

§ 22. **Bill of Lading Implies What—Contract.**—The jury are instructed that the bill of lading, offered in evidence, recites that the goods were in good order and condition when received by the defendant, and by said bill of lading the defendant contracted to deliver said goods in like good order and condition at P.; and if the jury believe, from the evidence, that the goods were not delivered in as good order and condition as when received by defendant—ordinary wear and tear and ordinary deterioration excepted—and that the plaintiff was injured and has sustained damage thereby, then the plaintiff is entitled to recover, unless the jury believe, from the evidence, that the damage or injury to such goods resulted from some fault or negligence of the plaintiff, or from, etc. *Bissell vs. Price*, 16 Ill., 408; *Wallace K. vs. Long*, 10 Ill. App., 504; *I. C. R. R. Co. vs. Cobb*, 72 Ill., 148; *Warden vs. Green*, 6 Watts, 424.

§ 23. **Bill of Lading Not Conclusive of Condition of the Goods.**—The court instructs the jury, that a bill of lading, while *prima facie* true, may be explained by other evidence; and if the

jury believe, from the evidence in this case, that the goods in question were wet or otherwise injured, or in bad condition, before they came into defendant's hands, and that they were, externally, in good condition when defendant received them, and that the person receiving the goods could not, without opening them, have ascertained their actual condition, then, the fact of receipting for them as in good order and condition will not preclude the defendant from showing their true condition in this suit. *Bissell vs. Price*, 16 Ill., 408; *Carson vs. Harris*, 4 G. Gr., 516; *Porter vs. C. & N. W. Rd. Co.*, 20 Ia., 73; *Ellis vs. Williard*, 5 Selden, 529; *Meyer vs. Peck*, 28 N. Y., 590.

§ 24. **Carrier Does Not Insure Condition of the Goods.**—The court instructs the jury, that while common carriers are insurers for the delivery of the goods received by them, they are not insurers that the goods will reach their destination in the same condition in which they were shipped. They are not liable for loss arising from ordinary wear and tear or ordinary deterioration in quantity or quality during the journey, nor for loss arising from the fault or negligence of the shipper.

§ 25. **Carriers can only Restrict their Common Law Liabilities by Special Contract.**—The law is, that a common carrier is bound to receive and carry goods offered to him for transportation, if in proper condition for shipping, subject to all the incidents of his business as a common carrier, and there can be no presumption that the shipper intended to abandon any of his legal rights; and the burden of proving a contract, by which his common law liability, as explained in these instructions, has been restricted, is upon the carrier. *Western T. Co. vs. Newhall*, 24 Ill., 466; *McCoy vs. The K. & D. M. R. Co.*, 44 Ia., 424; *N. Y. C. R. R. Co. vs. Lockwood*, 17 Wall. (U. S.), 357.

§ 26. **Legal Duty of Carriers Imposed by Law.**—That the right conferred upon railroad corporations, in their charters, to carry passengers and property for compensation, is coupled with the duty that they shall receive and carry passengers and freight on their roads as they may be offered, under the liabili-

ties and responsibilities which the law imposes upon common carriers, as explained in their instructions; and these liabilities cannot be avoided except by a special agreement to that effect. *P. & R. I. Ry. Co. vs. Coal Valley, etc., Co.*, 68 Ill., 489; *Wallace vs. Matthews*, 39 Ga., 617; *Thayer vs. St. Louis, etc., Rd. Co.*, 22 Ind., 26.

§ 27. **Exemption Clause in Receipt Not Binding.**—That where goods are received by a common carrier, and a receipt or a bill of lading is given, containing a clause exempting the carrier from certain liabilities therein mentioned, such receipt is not binding upon the shipper, unless it appears, by a preponderance of the evidence, that he knew of and assented to the exemption; and whether he did so assent is a question of fact for the jury. *Field vs. C. & R. I. Rd. Co.*, 71 Ill., 458; *Red. Car, etc.*, § 144; *N. J. Steam N. Co. vs. Merchants Bank*, 6 How. (U. S.), 344; *Sager vs. Ry. Co.*, 31 Me., 228; *Verner vs. Sweitzer*, 32 Penn St., 208.

Exemption Clause Binding if Agreed to.—The court instructs the jury, that, when a common carrier, receiving goods for transportation, gives a receipt for the goods, containing provisions limiting the common law liability of the carrier, other than those arising from its own fault or negligence, and the shipper accepts the receipt with a full knowledge of its terms, and intends to assent to such restrictions, it becomes his contract as fully as if he had signed it. But the simple acceptance of such a receipt does not conclusively bind the shipper; in order to bind him, it must appear, from the evidence, that he had knowledge or notice of the terms of the receipt and assented to them. *Adams Ex. vs. Haynes Co.*, 42 Ill., 89; *Gaines vs. U. T. & Q. Co.*, 28 Ohio St., 418; *Grace vs. Adams*, 100 Mass., 505; *Levering vs. U. Tras. Co.*, 42 Mo., 94; *Rd. Co. vs. Mfg. Co.* 16 Wal., 329.

§ 28. **Shipper will be Presumed to Agree to Exemption Clause, When.**—The court instructs the jury, that when a shipper delivers goods to a common carrier to be transported by the carrier, and takes a receipt for the goods in the nature of a bill of lading, specifying in the body of it, so as to form a part of

the receipt, the terms upon which they are to be carried and delivered, the shipper will be bound by the terms of the receipt, unless it appears, by the evidence, that some fraud or imposition was practiced upon the shipper to induce him to take such a receipt. *Edwd. on Bail.*, § 561; *Long vs. N. Y. Cent. Rd. Co.*, 50 N. Y., 76; *Grace vs. Adams*, 100 Mass., 505.

You are further instructed, that the receipt introduced in evidence in this case contains a stipulation exempting the defendant from all loss or injury to the goods arising from, etc.; and if you believe, from the evidence, that the plaintiff accepted the receipt without objection, then he is bound by its terms. The law presumes that he read it, or was otherwise informed of its contents, and if he accepted it without objection, that he assented to the conditions prescribed in it--unless you further believe, from the evidence, that some fraud or concealment, or improper practice, was used to induce him to take it.

§ 29. **Burden on the Carrier to Show Loss within Exemption.**—Where goods are received by a common carrier, to be carried under the usual bill of lading, containing a clause exempting the carrier from certain liabilities, other than those arising from his own fault or negligence, which are assented to by the shipper, and the goods are lost or injured, it is incumbent upon the carrier to show that the loss resulted from one of the causes excepted in the receipt, as explained in these instructions, or from an act of God, or the public enemies. *Western T. Co. vs. Newhall*, 24 Ill., 466; *Mitchell vs. The U. S. Ex. Co.*, 46 Ia., 214; *U. S. Ex. Co. vs. Graham*, 26 Ohio St., 595; *Red. Car., etc.*, § 267; *Shaw vs. Gardner*, 12 Gray, 488.

§ 30. **Liability not Limited by Notice.**—The jury are instructed, that a common carrier cannot discharge itself from the duty to safely carry and deliver goods intrusted to it for transportation, by notice, public or private, of the terms on which it receives or carries goods or property; to make such notice effectual, the shipper must assent to its terms. *Edwd. on Bailments*, § 560; *N. J. Steam Man. Co. vs. Merchants Bank*, 6 How. (U. S.), 344; *McMillan vs. Michigan, etc., Rd.*

Co., 16 Mich., 79; *Blossom vs. Dodd*, 43 N. Y. 264; *Verner vs. Sweitzer*, 32 Penn. St., 208.

The court instructs you, that the common law liability of a common carrier, as explained in these instructions, cannot be restricted by notice, even when such notice is brought home to the knowledge of the shipper. In order to give a notice this effect, it must appear, by a preponderance of the evidence, that the shipper expressly assented to the terms of the notice, and whether he did so assent, is a question of fact for the jury.

§ 31. **Must Exercise Reasonable Care to Prevent Loss within Exemption.**—Although the jury may believe, from the evidence, that the goods in question were destroyed (*by fire*), still, if the jury further believe, from the evidence, that by the exercise of ordinary prudence on the part of the defendant, or its servants, such destruction might have been prevented, then the defendant is liable in this suit. *Penn. Rd. Co. vs. Fries*, 87 Penn. St., 234.

§ 32. **Shipper Bound by Receipt, When.**—The court instructs the jury, that if a shipper take a receipt for his goods from a common carrier, which contains conditions limiting the liability of the carrier, with a full understanding of such conditions, and intending to assent to them, it becomes his contract as full as if he had signed it, and he will be bound by the conditions; but if a shipper accept such a receipt, because he has no alternative but to receive it, and not intending to assent to the conditions limiting the liability of the carrier, then he will not be bound by such conditions. *The Anchor Line vs. Dater*, 68 Ill., 369.

§ 33. **Shipper not Bound by Notice Printed on Receipt.**—The court instructs the jury, that the printed notice upon the (*back of the*) receipt, of the terms and conditions upon which the defendant received and carried the goods in question, is not binding upon the plaintiff, unless the jury find, from the evidence, that his attention was particularly called to that notice when he took the receipt, and that he expressly assented to the terms and conditions therein contained. The fact alone

that the plaintiff accepted the receipt is no evidence that he assented to the terms of said notice. *E. & W. Tr. Co. vs. Dater*, 91 Ill., 195.

§ 34. Can Not Restrict Liability Arising from its Own Negligence.—The law, on grounds of public policy, will not permit a common carrier of passengers or freight, to contract against liability for its own actual negligence, or that of its servants and employes. *U. M. S. Co. vs. Ind., etc., Rd. Co.*, 1 Disney (Ohio), 480; *Erie, etc., Rd. Co. vs. Wilcox*, 84 Ill., 239; *Ind., etc., Rd. Co. vs. Allen*, 31 Ind., 394; *Penn. Rd. Co. vs. McCloskey*, 23 Penn. St., 526; *School Dis., etc., vs. Boston, etc., Rd. Co.*, 102 Mass. 552.

The court instructs the jury, that although they may believe, from the evidence, that there was a special contract between the plaintiff and the defendant, that defendant should not be liable for any loss or injury to said goods, which might occur by reason of * * * still, such a contract would not relieve the defendant from loss resulting from negligence, or the want of ordinary care and prudence on the part of the defendant, or its servants.

And in this case, if you believe, from the evidence, that the defendant was guilty of negligence, or any want of ordinary care and caution, and that the loss complained of resulted therefrom, without any fault upon the part of the plaintiff, then he has a right to recover in this case. *Ill. C. Rd. Co. vs. Smyser et al.*, 38 Ill., 354; *L. & C. Rd. Co. vs. Brownlee*, 14 Bush, 590.

You are instructed, that by the terms of the receipt introduced in evidence in this case the defendant is not liable for any loss or damage to the goods in question, arising from or caused (*by fire*) while in the possession of defendants as common carriers, unless such (*fire*), or loss or damage was occasioned by some want of ordinary prudence or reasonable care on the part of the defendant; and although you may believe, from the evidence, that said goods were destroyed (*by fire*) while in the possession of the defendants, still the defendant is not liable therefor, unless you further believe, from the evidence, that the said defendant, or its servants, by the exercise of ordinary diligence or reasonable care, might have avoided such loss.

You are instructed that a common carrier is liable for the full value of goods, if they are lost through his negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount therein named, provided it is understood by the parties when the bill of lading is given, that the sum so agreed upon is less than the value of the goods. Whether, in this case, the goods in question were lost through the negligence of the defendant, and whether the goods were worth more than the price mentioned in the bill of lading, and whether this fact was known to the defendant when the bill of lading was given, are all questions of fact to be determined by you from the evidence in the case. *U. S. Ex. Co. vs. Backman*, 28 Ohio St., 144.

§ 35. **Burden of Proof.**—If goods are lost or damaged while in the custody of a common carrier, the presumption of law is that such loss or damage was occasioned by its default or negligence, and the burden of proof is on the carrier to show that it arose from causes for which the carrier was not responsible. *Nelson vs. Woodruff*, 1 Black., 156; *Lindsey vs. Chicago, M. & St. P. R. Co.*, 33 N. W. Rep., 7.

CHAPTER XI.

CARRIERS OF LIVE STOCK.

- SEC. 1. Duties and liabilities.
2. Care required of.
 3. Injuries without carrier's fault.
 4. Hogs—Care required of carrier.
 5. Degree of care to avoid delay.
 6. Suit by carrier for freight charges.
 7. Carrier's lien.

§ 1. Duties and Liabilities of.—It is the duty of a railroad company which undertakes to carry live stock for hire, to exercise all reasonable care, skill and judgment to provide cars of sufficient strength to prevent the animals from breaking through the same; and it will be responsible for a loss if it occurs through its failure to exercise such care, skill and judgment, although the animals be unruly and vicious. *Smith v. New Haven, etc., Rd. Co.*, 12 Allen, 531; *Great W. Rd. Co. v. Hawkins*, 18 Mich., 427; *McDaniel v. C. & N. W. Rd. Co.*, 24 Ia., 412; *Peters v. N. O. & C. R. R.*, 16 La. Ann., 222; *O., etc., R. R. Co. v. Pratt*, 89 U. S., 123.

§ 2. What Care Required of Carriers of Live Stock.—The jury are instructed, that the carrier of live stock must exercise all reasonable care, skill and judgment to provide safe and properly constructed cars, in which to carry the stock—to provide stations or stopping places along the road, where cattle may be fed; and if it fails to exercise such care, skill and judgment, and loss or damage results therefrom, the carrier will be liable to the owner for the damage thus sustained, if he is himself free from fault or negligence contributing to such injury.

A common carrier for hire is bound to exercise all the care and diligence which prudent and cautious men, in the same business, usually employ, for the safety and preservation of the

property confided to its care; and, in this case, if you believe, from the evidence, that the defendant did not use all such reasonable care and prudence to provide a safe and suitable car for plaintiff's stock, or in the running and management of the train in question, and that, by reason of such want of care and diligence, plaintiff's stock was injured, as charged in the declaration, then the defendant is liable for the resulting damage to the amount proved by the evidence. *Rhodes vs. Louisville, etc., Rd. Co.*, 9 Bush, 688.

If a common carrier receives live stock to be transported from one point to another, then he is bound to carry it safely to the point of destination, and there have it ready to deliver to the consignee and nothing will excuse such readiness to deliver except what are known as acts of God or the public enemy, or such accidents as arise from the conduct, vicious temper or propensities of the animals themselves. *Maynard vs. S., etc., Rd. Co.*, 71 N. Y. 180; *Banberg vs. J. C. Rd. Co.*, 9 S. C., 61; *McCoy vs. R. & D. M. Rd. Co.*, 44 Ia., 424; *S. & Ala. Rd. Co. vs. Henlien*, 52 Ala., 106; *Angell Car.*, § 214.

§ 3. **Injuries without Carrier's Fault.**—If the jury believe, from the evidence, that the defendant furnished a suitable car in which to ship the stock in question, and used all due care in managing and transporting the same, and that the injury complained of was caused by the peculiar character of the animals themselves, such as bad temper, unusual restiveness or viciousness, then the defendant is not liable in this case. *Smith vs. N. H., etc., Rd. Co.*, 12 Allen, 531; *Evans vs. Fitchburg, etc., Rd. Co.*, 111 Mass., 142.

You are instructed, that although they may believe, from the evidence, that the car in which plaintiff's stock was shipped was defective, in not having, etc., still, if you further believe, from the evidence, that such defect in no manner contributed to the injury complained of, then the defendant should not be held liable in this case by reason of such defect in said car.

If you believe, from the evidence, that the car in which the stock was shipped was then in a safe and suitable condition, and was managed in a careful and prudent manner, and that the injuries complained of were not caused by the carelessness or bad management of those having charge of the train, then you should find the defendant not guilty.

§ 4. **Care Required of Carriers of Hogs.**—That when hogs are shipped in railroad cars at a season of the year when, for their proper care and treatment, it is necessary to apply water to prevent them from being suffocated or overheated, then it is the duty of the railroad company to have proper stations and appliances for furnishing such water, and to so run and manage its trains as to afford reasonable opportunities to the persons in charge of the stock to apply such water, and if it does not exercise such care, skill and judgment, and loss or damage to the stock results therefrom, the carrier will be liable to the owner for the damage thus sustained; provided, he is himself free from fault or negligence contributing to such injury. Edwd. on Bail., § 682; *Toledo, etc., Rd. Co. vs. Thompson*, 71 Ill., 434.

§ 5. **Degree of Care Required to Avoid Delay.**—The jury are instructed, that the carrier of live stock for pay must exercise reasonable diligence in the business, and complete the journey within a reasonable time, and if he does not do so, and the stock is injured by the delay, the carrier will be liable to the owner for all damage caused by such delay. Edwd. on Bail., § 680; *Tucker vs. Pacific Rd. Co.*, 50 Mo., 385; *Sisson vs. Cleveland*, 14 Mich., 489.

If you believe, from the evidence, that some time, on or about, etc., the plaintiff shipped on board the defendant's cars the (*live stock*) to be transported from O. to C., and that there was no special contract between the parties in relation to the time of starting the train or of its arrival at C., then it was the duty of the defendant to start the train and to make the journey within a reasonable time after so receiving the stock; and, if you further believe, from the evidence, that the cars containing said stock did not arrive at C. within a reasonable time after the stock was placed on the cars, and that, by reason of such delay, the animals were unnecessarily reduced in weight, or otherwise depreciated in value, and the plaintiff thereby damaged, then the defendant is liable for such damage in this suit.

§ 6. **Suit by Carrier for Freight and Charges.**—If the jury believe, from the evidence, that at the time in question

the plaintiff was a common carrier, and in the ordinary course of business received the goods in question, in the proper line of transit, and paid freight and charges thereon to preceding carriers or warehousemen, then the plaintiff is entitled to reasonable charges for the transportation of said goods, besides the amount so paid to others, although the jury may believe, from the evidence, that said goods were damaged before they reached the plaintiff, while in the hands of some prior carrier; provided the jury further believe, from the evidence, that said goods were not injured after coming to the hands of plaintiff. *Bissell vs. Price*, 16 Ill., 408; *C. & N. W. Rd. Co. vs. N. W. U. P. Co.*, 38 Ia., 377; Red. Car., § 282.

§ 7. *Carrier's Lien.*—The jury are instructed, that a common carrier has no lien upon, or right to detain, goods or merchandise shipped from one place, or at one time, for charges on other goods shipped at another place, or another time, unless there is some contract to that effect expressed or implied between the parties (except on proof of general usage, etc.). *Edwd. on Bail.*, § 645; Red. Car., § 279.

If you believe, from the evidence, that the plaintiff, before the commencement of this suit by himself or his agent, demanded the property in question of the defendant, and that the defendant then refused to deliver the property, but did not claim, at the time of refusal to retain it for the charges thereon, then he is now estopped from setting up that claim as a reason for not delivering the property on demand.

[See *Replevin and Trover.*]

CHAPTER XII.

CARRIERS OF PASSENGERS AND BAGGAGE.

[See *Negligence—Railroad.*]

- SEC. 1. Common carrier defined.
2. Injury, *prima facie* evidence of negligence.
 3. Decree of care required of carrier of passengers.
 4. Decree of care required of the passenger.
 5. Jumping from the cars, not negligence, when.
 6. Jumping from the cars, negligence, when.
 7. Carrier not an insurer against accidents, when.
 8. Passenger takes all the risks necessarily incident to the mode of travel.
 9. Liability for baggage.
 10. Trunk containing articles of special value, carrier should be notified.
 11. Baggage, carrier's liability terminates, when.

§ 1. **Common Carrier Defined.**—If the jury believe, from the evidence, that the defendant corporation was engaged in the business of transporting passengers and freight, for hire, upon a railroad operated by said company, then the law denominates the defendant a common carrier.

§ 2. **Injury Prima Facie Evidence of Negligence.**—If the jury believe, from the evidence, that the plaintiff received an injury while riding on the cars of the defendant, by reason of a collision of said cars with other cars, and while he was himself using all reasonable care and caution to avoid injury, as charged in the declaration, then these facts will make a *prima facie* case of negligence against the defendant; and the burden of proof will be on the defendant to show that it, by its agents and servants, did use all reasonably practicable care and precaution to prevent such injury. Shear. & Red. on Neg., § 268; Edwd. on Bail., § 711; Cooley on Torts, 663.

If you believe, from the evidence, that the plaintiff was a passenger on board the cars of the defendant, in the month of

——— last, and that those cars came in collision with another train of cars, by and through the negligence of the defendant's agents or servants, as charged in the declaration, and that by reason of such negligence the plaintiff was injured and sustained damage, and also that he was himself using all reasonable care and caution to avoid such injury, then you should find a verdict for the plaintiff, and assess his damages. *C., B. & Q. R. R. vs. George*, 19 Ill., 510.

If you believe, from the evidence, that the plaintiff was a passenger on board the defendant's cars, and was injured by means of an accident occurring on the railroad of the defendant, while the plaintiff was exercising all reasonable care and caution to avoid the injury, as charged in the declaration, then the burden of showing that such accident was not the result of the negligence or lack of skill of the defendant, or its agents, is cast upon the defendant. *Sullivan vs. Philadelphia, etc., Rd. Co.*, 30 Penn. St., 234; *Meier vs. Penn. Rd. Co.*, 64 Penn. St., 225; *Boyce vs. Cal. Stage Co.*, 25 Cal., 460.

If you believe, from the evidence, that the plaintiff was injured by the overturning of the car in which he was a passenger (or by a collision of the cars, etc.), and was thereby injured, without any fault upon his part, he thereby makes out a *prima facie* case of negligence against the company, and places upon it the burden of proving, by a preponderance of evidence, that the accident resulted from a cause which could not have been foreseen or prevented by the exercise of all reasonable care, vigilance and foresight on behalf of the company. *P. C. & H. L. R. R. Co. vs. Thompson*, 56 Ill., 138; *Lemon vs. Chanslor*, 68 Mo., 340; *Red. on Car., etc.*, § 531.

The court instructs you that where a railway car is thrown from the track, and the passenger for hire is thereby injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the onus is on the company to show, by a preponderance of the evidence, that it was not negligent in any of these respects. *P. P. & J. R. R. Co. vs. Reynolds*, 88 Ill., 418; *Fairchild vs. Cal. Stage Co.*, 13 Cal., 599.

If you believe, from the evidence, that at the time in question the plaintiff was a passenger on board of defendant's cars

and that he received an injury, as alleged in the declaration, and that he was himself, at the time, exercising all reasonable care and caution to avoid the injury; and if you further believe, from the evidence, that the accident and injury complained of happened by reason of the negligent and unskillful construction of the track of defendant's railroad, or from the want of reasonable care and attention in keeping the track in repair, or in the management or control of the train on which the plaintiff was a passenger, then you should find a verdict for the plaintiff.

§ 3. Degree of Care required of the Carrier of Passengers.—The court instructs the jury, that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers.

"1. The court instructs the jury, that if they believe, from all the evidence in this case, that on or about the 16th day of February, 1880, the defendant was controlling and operating a train of cars on a railroad in this county, and that the defendant received the plaintiff on its cars as a passenger, for hire, then the court instructs the jury that the defendant was bound to make up its train, couple its cars, and manage and control its cars and engines in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such passenger. *Il. & St. J. R. R. Co. vs. Martin*, 111 Ill., 219.

The utmost degree of care which the human mind is capable of inventing is not required, but the highest degree of care and diligence which is reasonably practicable, under the circumstances of the case, is required. *Tuller vs. Talbot*, 23 Ill., 357; *Shear. & Red. on Neg.*, § 266; *Edwd. on Bail.*, § 710; *Cooley on Torts*, § 644; *Edwards vs. Lord*, 49 Me., 279; *Sales vs. W. Stage Co.*, 4 Ia., 547; *Fairchild vs. Cal. Stage Co.*, 13 Cal., 599; *Red. Car.*, § 340; *Taylor vs. Day*, 16 Vt., 566.

Carriers of passengers by railroad are bound to use all reasonably practicable precautions, as far as human foresight will go, for the safety of their passengers; and they are answerable to injured passengers for slight neglect of themselves or agents, in respect to the condition of the track, and conduct

and management of their trains, if injury ensues therefrom, and the passengers themselves are without fault. *G. & C. U. Rd. Co. vs. Yarwood*, 17 Ill., 509; *Fuller vs. N. Rd. Co.*, 21 Conn., 557.

You are instructed, that the law imposes upon common carriers of passengers the duty of providing for their safe conveyance, as far as human care and foresight can reasonably secure that result; and the passenger takes no risks, except such as are necessarily incident to the particular mode of conveyance or travel, while the carrier is using the utmost care and diligence that is reasonably practicable. *Holley vs. B. G. Co.*, 8 Gray, 131.

The court instructs you, as a matter of law, that if there is the least failure by a common carrier of passengers to exercise all the care and diligence that is reasonably practicable, in keeping its vehicles and appliances in safe condition, then the duty of the carrier is not fulfilled, and it is answerable for any injury or damage of which such neglect is the proximate cause; provided, the person injured is himself using reasonable care and caution to avoid such injury. *Briggs vs. Taylor*, 28 Vt., 180.

You are instructed, that it is the duty of a railway company employed in transporting passengers, to do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road, in providing safe coaches, machinery, tracks and roadway, for the safety of the passengers, and to keep the same in good repair; and if, from the evidence in this case, you believe that the plaintiff, while a passenger on the cars of defendant, received an injury resulting from the negligence of the defendant, or its servants, in either of the above particulars, you will find for the plaintiff; provided, you further believe, from the evidence, that the plaintiff's own negligence did not contribute to such injury.

The court instructs you, that the omission of any reasonably practicable precaution which would tend to insure the safety of the passenger, or lessen the danger to him, constitutes such a neglect in the carriers of passengers as will make them answerable in damages to a passenger injured by reason of such neglect, if the passenger is himself free from fault.

§ 4. **Degree of Care Required of the Passenger.**—The court instructs the jury, that a passenger on a public conveyance, in charge of a common carrier, is only required to exercise such care and foresight as is usual, under similar circumstances, with careful persons possessing ordinary intelligence.

§ 5. **Jumping from the Cars Not Negligence, When.**—The court instructs the jury, that the fact, if proved, that the plaintiff jumped from the cars to the ground, while said cars were in motion, and thus sustained the injury complained of, will not alone deprive him of his right to a recovery against defendant, if the jury further believe, from the evidence, that an accident had occurred to the train, which resulted from any want of reasonable care and caution on the part of the defendant, and that the plaintiff had reasonable ground to believe, and did believe, that his life or limb was in danger, and that it was necessary to leap from the cars in order to avoid the danger which threatened him. The question is not so much whether there was, in point of fact, any danger in remaining on the cars, as whether the plaintiff reasonably apprehended danger, and so leaped from the cars to escape it. *Ewd. on Bail.*, § 719; *Shearm. & Red. on Neg.*, § 282; *Buell vs. N. Y. Cent. R. R. Co.*, 31 N. Y., 314; *Galena & C. Rd. Co. vs. Yarwood*, 17 Ill., 509; *Red. Car.*, § 382; *S. W. Rd. Co. vs. Paulk*, 24 Ga., 356; *Ingalls vs. Bills*, 9 Met., 1; *Ry. Co. vs. Aspell*, 23 Penn St., 147.

Although you may believe, from the evidence, that the plaintiff leaped from the cars while they were in motion at the time of the alleged injury, and thereby caused the injury complained of, and that if he had remained on the car he would not have been injured, still this would not relieve the company from liability, provided you further believe, from the evidence, that the plaintiff had reasonable grounds to believe, and did believe, that his life or limb was in danger, and that it was necessary to leap from the cars in order to avoid the danger, and further, that this apparent danger was brought about by any negligence or want of reasonable care and foresight on the part of the defendant.

§ 6. **Jumping from the Cars Negligence, When.**—If the jury believe, from the evidence, that the plaintiff leaped from the

cars, at the time of the injury, under circumstances that would not have justified such an act on the part of an ordinarily careful and prudent man, and that the injury was caused by such jumping, and that if he had remained on the car no injury would have happened, then the plaintiff cannot recover in this suit. *Red. Car.*, § 83; *Lucas vs. Taunton, etc., Rd. Co.*, 6 Gray, 64; *Damont vs. N. O. etc., Rd. Co.*, 9 La. Ann., 441.

§ 7. **Carrier not an Insurer against Accidents.**—That while the defendant was bound to do all that human care, vigilance and foresight could reasonably do, consistent with the practical operation of the road, in order to prevent injuries to its passengers, still the company do not insure the absolute safety of its passengers: and, in this case, if the jury believe from the evidence that the injury complained of was occasioned by an internal or hidden defect in the * * * which a thorough and careful examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight and care, then the defendant is not liable for the injury so occasioned. *P., C. & N. L. R. R. Co. vs. Thompson*, 56 Ill., 138; *Red. Car.*, § 340; *Ingalls vs. Biels*, 9 Met. 1; *Ladd vs. New B. Rd. Co.*, 119 Mass., 412; *Taylor vs. G. T. R. D. Co.*, 48 N. H., 304; *McPadden vs. N. C. Rd. Co.*, 44 N. Y., 278; *Sherlock vs. Alling*, 44 Ind., 184; *Grand R. & Ind. Rd. Co. vs. Boyd*, 65 Ind., 526.

If you believe, from the evidence, that the injury to the plaintiff in this suit happened to him by mere accident, without any fault on the part of the defendant, or its employes, then the plaintiff cannot recover in this action.

If you believe, from the evidence, that the defendant exercised all reasonably practicable care, diligence and skill, in the construction, preservation and repairs of its track, and in managing and operating its road, at the time of the accident, and that the accident could not have been prevented by the use of the utmost practicable care, diligence and skill, then the plaintiff cannot recover in this action.

The court instructs you, that while common carriers of passengers are held to the very highest degree of care and pru-

dence which is consistent with the practical operation of their vehicles and the transaction of their business, still they are not absolute insurers of the personal safety of their passengers.

And, in this case, though you may believe, from the evidence, that the plaintiff was injured while a passenger on defendant's cars, still, if you further believe, from the evidence, that the defendant and its servants were not guilty of any negligence which contributed to such injury, then the defendant is not liable in this action. *G. & C. Union R. R. Co. vs. Farwood*, 15 Ill., 468.

§ 8. **The Passenger Takes all the Risks Necessarily Incident to the Mode of Conveyance.**—The jury are instructed, that plaintiff, as a passenger on the defendant's car, as a matter of law, is presumed to have taken upon himself all the risks necessarily incident to that mode of traveling; and if the jury believe, from the evidence, that without the fault of the defendant, but by inevitable accident, plaintiff was injured, the jury should find for the defendant.

The court instructs you, as a matter of law, that a passenger upon a railroad train takes all the risks attending that mode of travel, except such as are caused or increased by the negligence of the railroad company, or its servants. *Grand R. & Ind. Rd. Co. vs. Boyd*, 65 Ind., 526.

§ 9. **Liability for Baggage.**—The jury are instructed, that a common carrier of passengers, by receiving the baggage of a traveler who has engaged his passage, becomes immediately responsible for its safe delivery at the place of destination, and nothing but the act of God or the public enemies will excuse a non-delivery.

The court instructs you that the term baggage includes a reasonable amount of money in a trunk, intended for traveling expenses, and such articles of necessity and convenience as are usually carried by passengers for their personal use, instruction, amusement or protection. *Weeks vs. N. Y., etc., R. R. Co.*, 16 N. Y. Sup. Ct., 669; *Hutchings vs. Western, etc., R. R. Co.*, 25 Ga., 63; *Dexter vs. Syracuse, etc., Rd. Co.*, 42 N. Y., 326; *Parmlee vs. Fischer*, 22 Ill., 212; *Porter vs. Hildebrand*, 14 Penn. St., 129; *Hannibal, etc., Rd. Co. vs. Swift*,

12 Wallace, 262; *Gleason vs. Goodrich T. Co.*, 32 Wis., 85; *Toledo, etc., vs. Hammond*, 23 Ind. 379.

The court instructs you, that the term baggage does not extend to money, merchandise, or other valuables which are designed for purposes of business, and not for the traveling expenses, personal use, comfort, instruction, amusement or protection of the passenger. *Woods vs. Devine*, 13 Ill., 746.

You are instructed, that while the implied undertaking of a common carrier to insure the safe delivery of baggage as against everything but the act of God, and the public enemies, does not extend to the contents of a trunk consisting of merchandise, money or other valuables, which are designed for the purposes of trade or business; still the common carrier, if he takes charge of such property for the purpose of transporting, assumes the relation to it of an ordinary bailee, and is bound to take such care of it, as men of ordinary care and prudence would usually take of their own property under the same circumstances. *Penn. Co. vs. Miller*, 35 Ohio St., 541.

§ 10. If a Trunk Contains Articles of Special Value, Carrier Should be Notified.—The court instructs the jury, that a traveler who presents to a carrier of passengers, a trunk or valise, such as is commonly used for the transportation of wearing apparel, represents by implication, that it contains only such articles as are necessary for his comfort and convenience on the journey, and if it, in fact, contains merchandise, jewelry or other valuables, and the fact is not mentioned, the traveler is guilty of such a legal fraud as to absolve the carrier from the extraordinary liability of insurer. Red. Car., etc., § 77; *Smith et al. vs. B. & M. Ry. Co.*, 44 N. H., 325; *Magnin vs. Dinsmore*, 62 N. Y., 35.

The court instructs you, that a carrier of passengers is not bound to inquire as to the contents of a trunk, delivered to it as ordinary baggage, such as travelers usually carry, even if the same is of considerable weight, but the carrier may rely upon the representation, arising by implication, that it contains nothing more than baggage.

The court instructs you, that, where a person, under the pretense of having baggage transported, places in the hands of the agents of a railroad company, merchandise, jewelry and

other valuables, without notifying them of its character and value, he practices a fraud upon the company, which will prevent his recovery in case of loss, except it occurs through gross negligence of the company. *Edwd. on Bail*, § 529; *Mich. Cent. R. R. Co. vs. Carrow*, 73 Ill., 348; *Whitmore vs. Steamboat, etc.*, 20 Mo., 513; *Doyle vs. Kiser*, 6 Ind., 242.

§ 11. **Baggage—Liability of Carrier for Terminates, When.**—The court instructs the jury, that the responsibility of a railroad company, as a common carrier, for the baggage of a passenger, terminates on the expiration of a reasonable time for the passenger to come or send for the baggage, after the arrival of the train at the passenger's place of destination. After such reasonable time, the company may store the baggage in its warehouse, and it will then hold it as a warehouseman only. *Chicago, etc., R. R., Co. vs. Boyce*, 73 Ill., 510; *Mote vs. Chicago, etc., Rd. Co.*, 27 Ia., 22; *Louisville, etc., Rd. Co. vs. Mahn*, 8 Bust., 184; *Ross vs. Mo. Rd. Co.*, 4 Mo. App., 582; *Angell on Car.*, § 114, 320.

CHAPTER XIII.

COMMISSION MERCHANTS.

[See Agency.]

- SEC. 1. Commission men are agents.
2. Good faith required.
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4. May conform to the rules of the market.
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6. Margins.
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11. Account stated.
12. Presumed to conform to custom and usage.
13. Real estate brokers.

BOARD OF TRADE CONTRACTS.

14. Contracts—Illegal.
15. Contracts—Legal.

§ 1. **Commission Men are Agents.**—The jury are instructed, that commission merchants, who accept consignments of grain from country shippers, and undertake to dispose of the same for such shippers, and for a commission to be paid therefor, are regarded as the agents for such shippers. *Slack vs. Tucker*, 23 Wall. (U. S.), 321; *Edgerton vs. Michels*, 66 Wis., 124.

§ 2. **Good Faith Required.**—The jury are instructed that the law requires a factor or agent to exercise the utmost good faith towards his principal; and he has no right to realize a profit out of the property or fund of his principal, intrusted to his care by any concealed management of such property, or by any violations of his instructions; and any such profit that may arise in the management of his principal's property belongs to the principal. *Babcock vs. Obison*, 25 Ind., 75.

You are further instructed that an agent must not, in the management of his principal's property, place himself in a position which is adverse to that of his principal; and he is not permitted to avail himself of any advantage his position may give him to speculate off his principal, but all the profits or advantages gained in the transaction belong to the principal.

§ 3. **Degree of Care Required.**—The jury are instructed, that the law holds a consignee, in the conduct of the business of the consignor, to the same degree of care and diligence which a prudent man would exercise in the management of his own business. Story on Cont., § 361; *Phillips vs. Moir*, 69 Ill. 155.

The jury are instructed, that when a shipper sends grain to a commission man to be sold by the latter, and no instructions are given as to the price to be obtained, or the time of sale, then the commission man may sell in his discretion, being responsible for good faith and the exercise of that degree of care, discretion and skill which is ordinarily possessed and used by persons engaged in the same business. *Cotton vs. Hiller*, 52 Miss., 7; *Field vs. Furrington*, 10 Wall. (U. S.), 141; *Hausell vs. Thrall*, 18 Neb., 484; *Parkhill vs. Imlay*, 15 Wend., 431.

§ 4. **May Conform to Rules of the Market.**—The court instructs the jury, that a factor or commission man, while he cannot be held as a guarantor of the responsibility of persons to whom he sells in the ordinary course of business, and in accordance with the usages of the market where the sale takes place, must nevertheless use all reasonable efforts, and resort to all reasonably available sources of information to learn the pecuniary liability of the purchaser, and if he does not do so, and any loss occurs by reason thereof, he will be liable for such loss. *Foster vs. Waller*, 75 Ill., 464.

You are instructed, as a matter of law, that if there be a custom or usage of long standing, and generally known at the place to which property is consigned for sale, controlling the time within which payments may be made upon what are known as cash sales, then the consignor will be bound by the custom or usage, whether he in fact knows of the usage or not.

If you believe, from the evidence, that the defendant sold the grain in question for cash on delivery, without giving any credit to the purchaser, then it was his duty to obtain the pay for the grain before he allowed it to go beyond his control, unless you further believe, from the evidence, that there is a custom or usage of long standing, uniform and generally known among commission men doing business on the board of trade, in (*Chicago*), that a sale for cash means a credit until the next day, and that the defendant sold the grain in question with reference to such custom. Story on Cont., § 354; *Deshler vs. Beers*, 32 Ill., 368.

If you believe, from the evidence, that during the time covering the matters in controversy in this suit, the plaintiffs were doing business as commission men on the board of trade, in (*Chicago*), and that the defendant was accustomed to ship grain to them, to be sold and disposed of by them, in the way of their business, he is conclusively presumed to have intended that the plaintiffs should transact such business according to the known, general and uniform rules and usages established for conducting such business at that place, if the evidence shows that there were any such rules and usages; and that whether the defendant knew of such rules and usages or not is immaterial; unless it be shown, by a preponderance of the evidence, that there was some special contract between the parties to the contrary. *Cothran v. Elliss*, 107 Ill., 413.

If you believe, from the evidence, that, during the time in question, the defendant was accustomed, from time to time, to send grain to the plaintiffs, to be sold by them as commission men, doing business on the board of trade, in (*Chicago*), and that by the long established, uniform, and general custom and usage of that business at that point, the grain so shipped was placed in elevators and mixed with other grain of the same kind and grade, and a receipt or certificate issued by the warehousemen to the consignee, entitling him to the amount of grain of the kind and grade specified in the receipts; and if you further believe, from the evidence, that it was in accordance with the same usage or custom for the consignees to use such certificates in making sales of grain, in the way of their general business, without regard to the particular grain upon which the certificates were issued, then the

plaintiffs would be justified in so using the receipts received by them upon receipt of defendant's grain, and the transfer of such receipts, in connection with grain sold by them, would not of itself be evidence of a sale of grain on account of defendant, nor of a sale of his grain.

If you believe, from the evidence in this case, that at the time covering the transactions in question, it was the established, general and uniform usage and custom for commission men doing business on the board of trade, in (*Chicago*), to use and transfer the receipts in their hands, for grain deposited in the elevators in that city, whenever a sale was made by them, without regard to the particular person upon whose shipments such receipts were issued, then the transfer of such receipts would not alone be evidence of the sale, or intended sale, of the grain of the person upon whose shipments the receipts were issued.

§ 5. **Must Conform to Rules and Usages.**—The court instructs the jury, that when a principal employs a commission man to buy (*or sell*) grain on the board of trade in (*Chicago*), the commission man is not only bound to conduct the transaction with all such reasonable and ordinary care and judgment as is usually exercised by persons engaged in the same business, but he is also required, in the transaction of the business intrusted to him, to conform to all the known, uniform, general and established rules and usages existing in that market, if any such are shown to exist by the evidence; and if he fails to do so, and any loss results therefrom, he will have to bear the loss. *Howe v. Sutherland*, 39 Ia., 484.

§ 6. **Margins.**—If the jury believe, from the evidence, that before and at the time of the transactions in question, the defendants were commission men, doing business on the board of trade in (*Chicago*), and that some time about, etc., the parties entered into a contract, whereby it was agreed that the defendants should purchase grain in (*Chicago*) market for the plaintiff, and hold the same until ordered by him to sell; and that it was a part of the same agreement that the plaintiff should place in the hands of the defendants a margin, or sum of money, equal to (*five*) cents per bushel of the grain so to

be purchased; and that in case the price of such grain should fall in such market, while the said contract should run, that then the said plaintiff should advance to the defendants additional margins, as they should from time to time demand; and if the jury further believe, from the evidence, that pursuant to that contract, the defendants did purchase the grain in question for the plaintiff, and that the plaintiff did then place in the hands of said defendants a margin (*five*) cents per bushel of said purchase, and that after that the price of said grain did fall in said market, then it became the duty of the plaintiff, from time to time, upon reasonable notice, to advance to the defendants additional margins, as the same should be demanded by them; and if he failed to do so, after reasonable notice, then the defendants had a right to sell such grain; provided, they exercised good faith and reasonable discretion in so doing.

And if you believe, from the evidence, that the parties entered into the contract supposed, and stated in the last preceding instruction, and that the defendants bought the grain, as therein supposed; then, if you further believe, from the evidence, that the market price of the corn afterwards fell, in said market; and further, that the defendants notified the plaintiff of that fact, and demanded additional margins, and that the plaintiff did not, within a reasonable time after such notice and demand, advance the margins so demanded, then the defendants had a right to sell said corn in their discretion, being responsible only for the exercise of good faith in that behalf. *Corbett vs. Underwood*, 83 Ill., 324; *Moeller vs. McLagan*, 60 Ill., 317; *Denton vs. Jackson*, 106 Ill., 433.

§ 7. *Factor's Lien*.—The court instructs the jury, that a commission man has a lien on the goods in his possession, not only for his advances, commissions and expenses, made and incurred upon those particular goods, but he also has a lien for any general balance due to him; provided, there is no special contract between the parties waiving such lien. *Schiffer vs. Feagin*, 51 Ala., 335; *Tison et al. vs. Howard*, 57 Ga., 410; 2 Kent Com., 640; Story on Agency, § 376; *Jarvis vs. Rogers*, 15 Mass., 389.

§ 8. **Right to Sell without Permission.**—The jury are instructed, that a commission merchant, who has received consignments of grain, with orders to hold the same, has a lien thereon for any and all advances made and liabilities incurred by him on such grain; and when he has made advances upon such grain to more than its value, or where such advances and the proper charges and expenses are equal to its then market value, and the commission man has reasonable grounds to believe that such grain is in danger of deterioration in quality or depreciation in value, and the consignor, upon the request of the consignee, neglects or refuses, after reasonable notice, to make such advances good, and refuses or declines to give permission to the consignee to sell the same, then the commission merchant has a right to sell such grain, or so much thereof as is necessary to protect himself from loss, without the orders of the consignor, and even contrary thereto, unless there be an express agreement that this shall not be done. *Howard vs. Smith*, 56 Mo., 314; *White vs. Smith*, 54 N. Y., 522; *Weed vs. Adams*, 37 Conn., 378.

You are instructed, that when a commission man makes advances, or incurs liabilities, in the discharge of his duties, upon a consignment of goods, he may sell the goods, or such part thereof as shall be necessary to reimburse himself, for such advances and liabilities, including his own proper charges, in the exercise of a sound discretion, and in accordance with the general rules and usages of the market, if any such are proved, and reimburse himself for all such advances, liabilities and charges; provided, the consignor fails or neglects to reimburse the commission man for such advances and liabilities within a reasonable time after being notified so to do. Story on Cont., 357.

§ 9. **When May not Sell.**—The jury are instructed, that an agent or factor, holding goods for his principal, has no right, without the authority of the principal, to sell such goods, except it be to reimburse himself for actual advances made or liabilities incurred, when he has no funds in his hands belonging to his principal sufficient to reimburse himself for such advances and liabilities, and when the principal fails or refuses

to provide funds for such reimbursement within a reasonable time after demand therefor; and if he does sell such goods for any other purpose, without the principal's authority, or while he has funds in his hands belonging to his principal, sufficient to reimburse himself for such advances and liabilities, he will render himself liable for all loss to the principal occasioned by such sale. Story on Cont., § 357.

If you believe, from the evidence, that the defendant was holding the corn in question for the plaintiff, under an agreement made between the parties that the defendant should so hold it until ordered to sell by the plaintiff, provided, the plaintiff should keep in the hands of the defendant a sum of money, known as a margin, equal to at least —, then the defendant would have no right to sell the corn, in violation of the plaintiff's directions (*or without orders from him*), on the ground that the margin was exhausted, without first notifying the plaintiff that it was so exhausted, and giving him a reasonable time within which to put up the margin so agreed upon.

§ 10. **Selling without Orders—Damage Must be Shown.**—Though the jury may find that the defendants were not authorized to sell the grain in question at the time they did sell it, still, before the plaintiff would be entitled to recover on that account, it must appear, by a preponderance of evidence, that he has suffered some damage thereby, and the jury can only allow for that violation of duty, if it be a violation, such an amount of damages as the jury believe, from the evidence, the plaintiff has sustained as the direct consequences thereof.

§ 11. **Account Stated.**—If the jury believe, from the evidence, that the plaintiffs were commission men, doing business in Chicago, and, in the way of their business, were from time to time receiving grain, sent to them from the defendant, to be sold for him by them, and were also, from time to time, making payments to defendant on account of such sales, or advancing money to him in connection with said business; and further, that the plaintiffs, from time to time, sent to the defendant, statements of the accounts between them, which

were received by defendant, and that he did not, within a reasonable time, object to said statements and notify the plaintiffs of said objection, then, as a matter of law, the jury should regard the defendant as admitting that the accounts were correctly stated, and he will be bound by them, unless it is shown, by a preponderance of the evidence, that there was some error or mistake in the accounts as rendered to him, of which he was not informed at the time he so consented to them.

§ 12. **Factors Presumed to Conform to Custom and Usage.**—That, when one person employs another to transact for him a particular business, at a particular place or market, the employer is presumed to have given to the other authority to act, in accordance with the rules and usages there established, and generally known and adopted, though the principal may be ignorant of them.

A person who deals in a particular market must be taken to deal according to the known, general and uniform rules and usages of that market, and he who employs another to act for him at a particular place or market, in the absence of a particular contract to the contrary, must be taken as intending that the business to be done will be done according to the rules and usages of that place or market, whether he, in fact, knew of such rules and usages or not. *Bailey vs. Bensley et al.*, 87 Ill., 556.

§ 13. **Real Estate Brokers.**—If the jury believe, from the evidence, that the defendant solicited the plaintiff to use his efforts to effect a sale of the premises in question, and told him he would pay him (liberally for the same), and that relying upon that promise the plaintiff did use his efforts in that behalf, and did perform services in endeavoring to effect such sale, then the defendant is liable for what such services were reasonably worth. *McGill vs. Pressley*, 62 Ind., 193; *Hinton vs. Coleman*, 45 Wis., 165.

If you believe, from the evidence, that the plaintiff really performed services for the defendant in endeavor to effect a sale of the premises in question in the expectation of being paid therefor and that such services were of any value to the

defendant, and further that the defendant knew at the time that the plaintiff was performing such services with the expectation of being paid therefor, then the plaintiff is entitled to recover what such services were reasonably worth, although you may find from the evidence that there was no express promise to pay and no price agreed upon. *McGill vs. Pressley*, 62 Ind., 193.

You are instructed that the contract between defendant and the said B. introduced in evidence in this case is a binding contract between the parties thereto, and if you believe from the evidence that the defendant agreed with the plaintiff that if he would find a purchaser for or make a sale of said property defendant would pay him, etc., and that in pursuance of that agreement and promise the plaintiff by his efforts and services procured the making of said contract of sale between the said defendant and B., then the plaintiff is entitled to recover no matter whether the said B. afterwards refused to carry out said contract of sale or not. *Love et al. vs. Miller et al.*, 53 Ind., 294; *Rees vs. Spruance*, 45 Ill., 308; *Middleton vs. Finda*, 25 Cal., 76; *Glendworth vs. Luther*, 21 Barb., 145; *Rice vs. Mayo*, 107 Mass., 550.

If you believe, from the evidence, that the defendant left a description of the property with the plaintiff as real estate agent for the purpose of having him find a purchaser for the property under an agreement to pay him, etc., and that no time was fixed within which this was to be done, then the law would imply that it was to be done within a reasonable time thereafter, and if you further believe, from the evidence, that the plaintiff, relying on such promise and agreement, did within a reasonable time find a purchaser at the price named, then the plaintiff is entitled to his pay and commissions, although you may further find from the evidence that the defendant had already sold the property before the plaintiff found his purchaser; provided you further believe from the evidence that the plaintiff did not know and had had no notice of the fact that the defendant had effected a sale of the property at the time the plaintiff found his purchaser. *Lane vs. Albright*, 49 Ind., 275.

If you believe from the evidence that the defendant requested the plaintiff to assist him in finding a purchaser for,

or in making sale of property in question, and that acting on that request the plaintiff introduced to defendant as the purchaser one A. B., and that the said A. B. did afterwards purchase said property, then the plaintiff is entitled to a reasonable compensation for his services although the contract of sale was actually negotiated and effected by the defendant himself. *Arrington vs. Cary*, 5 Bax. (Tenn.), 509.

§ 14. **Contracts, Illegal.**—The jury are instructed, that a contract for the sale and future delivery of grain, by which the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they choose, and which, on its maturity, is to be filled by adjusting the differences in the market value, is an option contract, in the nature of a gambling transaction prohibited by law. *Pickering vs. Cease*, 79 Ill., 328; *In re Green*, 7 Biss., 338; *Rudolf vs. Winters*, 7 Neb., 125.

A dealer on the board of trade has a right to sell and agree to deliver at some future time property which he does not own at the time but which he expects to go into the market and buy, but an agreement for a sale and future delivery of grain is a gambling contract and illegal if it is the understanding and intention of both the parties at the time that there is to be no actual sale, purchase, receipt or delivery of the grain, at the time fixed for the delivery thereof but only that the parties shall only then settle and the purchaser receive or pay the difference between the agreed price and the market price according as the market price is less or greater than the agreed price. *Gregory vs. Wendall*, 40 Mich., 432; *Ramsey vs. Berry*, 65 Mo., 574.

One of the questions to be passed upon by the jury, is this: was there an actual *bona fide* contract between the parties, for a sale of corn to be delivered by the seller and received by the purchaser, or was it understood that no grain should be actually purchased or delivered, but only that a settlement should be made upon the basis of the market price at the time mentioned for delivery. *Kirkpatrick vs. Bousell*, 72 Penn. St., 155.

If the jury believe, from the evidence in this case, that the deals or contracts shown in evidence were a mere contrivance for

enabling the parties thereto to hazard the deposit of money on the fluctuations of the market value of No. 2 spring wheat, and were not, in fact, real contracts for the sale of wheat by the parties thereto, then the jury are instructed, as a matter of law, that such deals or contracts were illegal and void, and would be binding on neither party. *Lowry vs. Dillman*, 59 Wis., 197; *Burnard vs. Bachaus*, 52 Wis., 593.

That by the contract for the sale of the wheat in question neither party intended to deliver or receive any wheat under the contract, but that the parties expected thereby to wager the margin deposited, and that either party had the option to annul the contract at any time by refusing to put up additional margins, and that, in fact, the contract was a mere devise for carrying out a wager on the market value of the wheat and was not a *bona fide* sale or agreement to sell for future delivery, then the jury are instructed that such contract is illegal and void. *Tomlin vs. Callen*, 69 Ia., 229; *First Nat. B. vs. Oskaloosa P. Co.*, 66 Ia., 41.

Although the jury may believe, from the evidence, that at or about the time stated, the plaintiff and defendant entered into a contract by which it was nominally and in terms agreed between them, etc., still, if the jury further believe from the evidence that at the time of making said agreement, neither of the parties contemplated an actual sale and delivery of said corn, but that it was understood between them that the said deal was to be settled by the parties by the payment from one to the other of the difference between the agreed price and the market price on the day of settlement, then such a contract is in law regarded as a gambling transaction and is illegal and void, and neither party can sustain an action for a breach of such contract. *Tenney vs. Foote*, 4 Ill. App., 594.

§ 15. **Contracts Legal.**—If the jury believe, from the evidence, that the defendant employed the plaintiff to act for him in the capacity of broker or commission man to purchase and sell grain for him on the board of trade, and that, acting under that employment, the plaintiff did in good faith contract to purchase for the defendant 2,000 bushels of No. 2 corn, to be delivered during the then next month of ———, then the fact, if proved, that the defendant intended to resell

the same corn before the time of its delivery under such contract of purchase, would not alone render the transaction a gambling contract or in any manner invalidate it. *Sawyer vs. Taggart*, 14 Bush (Ky.), 727.

The jury are further instructed, that if one of the parties to a contract for the future sale and delivery of grain contemplates and intends an actual sale and delivery, then the transaction would be legal and binding, irrespective of any illegal purpose entertained by the other party; a contract cannot be a gambling contract unless both parties concur in the illegal intent. *Gregory vs. Wendall*, 40 Mich., 432; *Story vs. Solomon*, 71 N. Y., 420; *Wall vs. Schneider*, 59 Wis., 352.

The jury are instructed as a rule of law that when a customer orders commission merchants to make contracts for the purchase and future delivery of (lard) or other commodities for him, and the commission merchants in pursuance of such order do enter into valid contracts for the delivery at a future time of the commodities so ordered, the law implies a contract on the part of the customer to furnish to the commission merchants sufficient funds to pay for the commodities so purchased when delivered; and the customer must also do and perform with and for his commission merchants and for their protection, whatever the law or the general and uniform custom and usage of the place where the commission merchants are ordered to make the purchase requires, provided the jury believe, from the evidence, that there were any such customs and usage at that place, and if the commission merchants have made any such contracts as were ordered by the customers and they have been required to pay out money on account of such contracts they can recover of their customer, at law, for the money so paid out; provided the money so paid has been paid in accordance with the usage and customs of the market where such contract was made.

If the jury believe, from the evidence, that the plaintiffs, as commission merchants, did, at the time alleged, enter into contracts upon the board of trade in C., for the purchase of, etc., upon the order of the defendant and as ordered by him, and that by the (rules of the board), or by the general and uniform custom and usage prevailing among dealers on the

board, the plaintiffs were required to furnish a certain sum of money as margins upon such contracts, then and in that case it became the duty of the defendant to furnish to the plaintiffs a reasonable sum as such margins, when called upon so to do. And if the jury further believe from the evidence that the plaintiffs did enter into such contracts, as aforesaid, upon said board and upon the order of the defendant, and were required by the (rules) or customs and usage aforesaid to put up margins, and that they called upon the defendant for a reasonable sum of money as such margins, and that the defendant when so called upon neglected or refused, or was unable to furnish the same within a reasonable time, then the plaintiffs had the right to close out the contracts so made by them, and thereby determine the loss, if any, sustained by them by reason of such contracts, and call upon the defendants to make good such loss; provided the jury believe, from the evidence, there was no special contract or arrangement between the parties, varying these rules or usages and customs. *Denton vs. Jackson*, 106 Ill., 433; *Corbit vs. Underwood*, 83 Ill., 324; *Miller vs. McLagan*, 60 Ill., 317.

If the jury believe, from the evidence, that some time on and about, etc., the plaintiff and the defendant entered into a contract, whereby it was in good faith mutually agreed between them that defendant should sell to the plaintiff 25,000 bushels No. 2 corn, at 43 cents per bushel, deliverable to the plaintiff at any time during the month of (November) following, at the option of the defendant, the plaintiff to pay for the same at the price of 43 cents per bushel on delivery, then such contract would be valid and binding upon the parties. *Ibid.*

If the jury believe, from the evidence, that on and about, etc., the parties in good faith entered into a contract whereby it was mutually agreed between them that defendant should sell to the plaintiff 25,000 bushels of No. 2 corn at 43 cents per bushel, deliverable to the plaintiff at any time during the month of, etc., at defendant's election, the plaintiff to pay for the same at the price aforesaid on delivery—and if the jury further believe from the evidence that such contract was made between the parties as members of the board of trade at, etc., and under the rules of said board, and that it was one of the

rules of said board or that there was any general and uniform custom or usage among dealers on said board that when such contracts had been made and the price of the grain should advance before the time of delivery of the same that then the purchaser had the right to call upon the seller to put up or deposit a sum of money as margins reasonably sufficient to insure the performance of the contract by the seller and that in case of his failure so to do that the purchaser should have the right to go upon the board and purchase an equal amount of grain at the then market price for account of the seller, charging him with the difference between the contract price and such market price—and if the jury further believe from the evidence that on or about, etc., the market price of said corn on said board of trade did advance to about 49 cents per bushel and that plaintiff then requested defendant to put up such margins, and defendant neglected and refused to do so within a reasonable time after such demand, then the plaintiff had a right to go into the market and purchase for the account of the defendant 25,000 bushels of No. 2 corn to be delivered, etc., at the then market price. *Follansbee vs. Adams*, 86 Ill., 13.

And if the jury further believe from the evidence that on, etc., the plaintiff did in good faith purchase 25,000 bushels of No. 2 corn at 49 cents per bushel for the account of the said defendant to be delivered, etc., and that 49 cents was then the fair market price thereof, then the plaintiff is entitled to recover from the defendant the difference between the contract price and the market price so paid.

If the jury believe from the evidence that some time about, etc., the parties entered into a contract (as in the last preceding instruction) and that such contract was made between the parties as members of the board of trade at, etc., and under the rules of said board of trade, then the court instructs you that under the rules of said board introduced in evidence in this suit, in case of an advance in the market price of said corn before the delivery thereof, the plaintiff would have the right to call upon the defendant to put up or deposit a sum of money as margins reasonably sufficient to cover such advance in price, and in the event of the defendant refusing to put up such margins the plaintiff would have the right to go upon the board and purchase the same quantity of No. 2 corn at the

then market price for the account of the defendant and charge him with the difference between the contract price and the market price so paid, whether in this case the price of corn did advance as alleged before delivery and whether the plaintiff did demand such margins and whether the defendant refused to put such margins and whether the plaintiff did in good faith purchase the 25,000 bushels of corn for the account of the defendant and pay therefor—49 cents a bushel,—are all questions of fact to be determined by the jury from a preponderance of the evidence in the case.

If the jury believe, from the evidence, that there was a contract between plaintiff and defendant, which fixed the amount of margins which plaintiff should keep good, then they are instructed as a matter of law, that any custom of the board of trade, as to the amount of margins usual or reasonable, is immaterial in this case, for the contract will govern as to that matter.

If the jury find, from the evidence, that there was a contract between the parties as to the amount of margins which plaintiff should put up for the protection of the defendants in their deals for him, and that the plaintiff did not keep up the margin which he had contracted to do, and that demand therefor was made by the defendants, and that upon such demand the plaintiff neglected and refused to put such margins within a reasonable time after such demand, then the defendants would have a right to close out the plaintiff's deals in accordance with the usages and customs prevailing among dealers on the board of trade, provided the jury believe, from the evidence, that there was, at the time, any general uniform and well known usage or custom governing such matters among dealers on the board of trade. *Denton vs. Jackson*, 106 Ill., 433.

If the jury believe, from the evidence, that at the time in question a general and uniform custom and usage obtained among commission merchants doing business on the board of trade at, etc., to the purport and effect, that when one commission merchant upon the order of a customer sold to another commission merchant a quantity of any commodity for future delivery and it afterwards occurred before the maturity of the contract that the first commission merchant received from another customer an order to purchase the same, or a larger

quantity of the same commodity for the same future delivery, and he executed this second order by making a purchase from the same commission merchant to whom he had made the sale in the other case, that then and in such case, the two commission merchants would meet together and exchange or cancel both the contracts as between themselves, adjusting the differences, if any, in the prices between the two contracts and restoring the margins, if any have been put up, and that from that time forth the first commission merchant should hold such contract of purchase for the benefit of the customer for whom he had sold in the first instance, so that the commodity of the selling customer might, when delivered, be turned in on the order or contract of the purchasing customer, and that in the meantime the commission merchant guaranteed to each of his customers the performance of the contract as originally made on his behalf, then the court instructs you that these customs and usages are founded in commercial convenience and are not in contravention of law but are binding on the parties.

The jury are instructed that by the laws of this State, warehouse receipts are assignable by indorsement and the delivery of a receipt properly indorsed is equivalent to a delivery of the grain called for by the receipt and a tender or offer of a warehouse receipt properly indorsed is equivalent to a tender of the grain called for by the receipt. *Gregory vs. Wendall*, 40 Mich., 432; *Davis vs. Russell*, 52 Cal., 611.

CHAPTER XIV.

CONDEMNATION OF LAND—EMINENT DOMAIN.

- SEC. 1. Measure of damages.
2. Compensation for land taken irrespective of benefits.
3. Damages not allowed for part not taken, when.
4. Compensation covers what injuries.
5. Appropriation of streets.

NOTE.—Concerning the amount of damages or the principles upon which compensation is to be measured to the owner of property taken for public use there are no fixed rules embracing the whole subject universally applicable throughout the different states. In determining the *quantum* of damage, regard must be had to any constitutional or statutory provisions relating to the subject and also to the previous course of decisions in which those provisions have not unfrequently originated. In states where the subject is not expressly regulated by positive law the books abound in cases which cannot be reconciled respecting what is and what is not proper to be taken into consideration in the way of benefits on one hand or of injuries on the other. 2 Dillon on Munic. Corp., § 486.

§ 1. **Measure of Damages.**—The court instructs the jury that it is their duty in this case to ascertain from the evidence the just compensation to be made to the several claimants for the property to be taken or damaged by the proposed improvement.

Just compensation means the payment of such a sum of money to the owner of the property proposed to be taken or damaged as will make him whole, so that upon the receipt by him of the compensation and damage awarded he will not be any poorer by reason of his property being so taken or damaged. *Bigelow vs. W. W. Rd. Co.*, 27 Wis., 478; 1 Redfld. on Ry., 261.

In estimating the compensation to be paid for the property to be taken, the jury should exclude from their minds all consideration of possible benefits, if any, to accrue from the improvement to the lots or parts of lots not proposed to be taken. *Ry. vs. Gilson*, 8 Watts, 243.

You are instructed that the measure of compensation to be

awarded to the owner of the land sought to be condemned in this proceeding is the value of the land as a part of the lot to which it belongs; and in determining such value the jury are instructed not to take into consideration the effect which the proposed improvement will have either upon the whole lot, the part to be taken or the part that will remain after the improvement is made, the value of the portion which is proposed to be taken should be determined wholly independently of the purpose for which it is to be taken.

§ 2. **Compensation to be Made for Land Taken Irrespective of Benefits.**—In assessing the compensation to be made to the owners of the land the jury should assess the value of the land taken at what they believe, from the evidence, it is worth, irrespective of any benefits which may or may not accrue to the remainder of the tract—and also any damage which the jury believe, from the evidence, will result to the owner by reason of the diminished value of the remainder of the tract, if anything, in consequence of the appropriation of the land taken (over and above special benefits when proper).

In ascertaining these amounts you are to take into consideration not only the purposes to which the land is or has been applied but any other beneficial purpose to which the jury can see from the evidence it might reasonably be applied, and which would affect the amount of compensation or damages. *Railway Co. vs. Longworth*, 30 Ohio St., 108.

You are instructed, as a matter of law, that in ascertaining the just compensation to be made to the owners of the several tracts of land proposed to be taken, no benefit or advantage which may accrue to lands or property not taken, should be set off or deducted from the compensation coming to the owner on account of the value of the land which is to be taken.

§ 3. **Damages not Allowed for Part not Taken, When.**—If you believe, from the evidence, that the remainder of any lot or parcel of land, part of which is proposed to be taken for, etc., will be specially benefited by the improvement, that is, that it will receive benefits or advantages which do not accrue to other property in the neighborhood, and that these special benefits will increase its value beyond its value as a part of the

whole lot before any part was taken, then you should find that the remainder of the property, or the part not taken, will not be damaged by the contemplated improvement.

If you believe, from the evidence, with regard to any lot or parcel of land in question, that the just compensation which is to be awarded for the part proposed to be taken, when added to the value of the remainder of the lot not taken, will be equal to the value of the whole lot or parcel of land before the taking, then you should not award any damages to that portion or parcel of the land not taken.

§ 4. **Compensation Covers What Injuries.**—In cases of this kind damages are assessed and compensation made once for all, and this proceeding will forever bar the claimant and all persons holding the property under him from any future claim for damages resulting from the building and operation of the contemplated road in an ordinary and careful manner. The compensation is, therefore, to be determined according to the full measure of the rights acquired by the corporation, and not according to the mode in which they propose to exercise those rights in the first instance. The damages to be assessed include all the injury to the remaining portion of the land by cutting off access to or egress from the different parts of the farm, or in rendering it inconvenient for use by cutting it up into irregular pieces or in any manner rendering it less suitable for convenient and profitable occupation and use, or for cutting it up into lots, provided the jury believe from the evidence that the construction and operation of the contemplated road across the claimant's farm will injuriously affect its value in any of these modes. *Drury vs. Midland Rd. Co.*, 127 Mass., 571; *C. & I. Rd. Co. vs. Hopkins*, 90 Ill., 316; 1 Redfld. on Ry., 288.

If you believe, from the evidence, that the lands of the claimant adjoining the proposed railroad track, will be less valuable because of their exposure to fire, or for the reason that the railroad will cut the lands into irregular fields, or will render access to the different portions of the lands more inconvenient or dangerous, then, these are all matters which may be taken into account by you in estimating the claimant's damages. You are not to fix any definite estimate of the amount of

damages arising from these several sources. The true question to be determined is, what is the market value of the property as a whole, without the railroad, and what will be its market value after the road is built and in operation, making no allowance for any general benefits which the property may derive from the building of the road, and which it will share in common with the other property generally in the vicinity. The value of the property taken and the depreciation in the market value of the remainder, if any, is the compensation to which claimant is entitled. *Utica R. R. Co. in re*, 56 Barb., 456; *Snyder vs. Railroad Co.*, 25 Wis., 60.

In determining whether the property in question will be injuriously affected by the building and operation of the railroad, the jury may consider whether the property is adapted to business purposes, or only useful as residence property; but you are only to take these matters into consideration for the purpose of determining whether the value of the property will be depreciated, and the extent of such depreciation by the building and operation of said railroad as contemplated.

You are further instructed, that in no event must the damages exceed the sum which would be obtained by determining the difference between the actual value of the property in question with the railroad constructed and operated in the manner contemplated, and what that value would be, were the railroad not built.

You are instructed that they should not take as a separate and distinct basis for the assessment of damages, such remote contingencies as frightening of horses, liability of fires, danger to persons from passing trains; such contingencies are only to be considered for the purpose of determining whether and to what extent the value of the property will be decreased by the building and operation of the railroad. If, in consequence of its exposure to such dangers, the actual value of the property will be diminished to any extent, then such decrease in value measures the actual loss to the owner. *Blesch vs. C. & N. W. R. R.*, 48 Wis., 168.

If you believe, from the evidence, that in consequence of the building and operation of the railroad the property in question would be depreciated in value, whether from exposure to fire, inconvenience from trains or from danger to per-

sons and property, then such matters will be proper to be taken into account by you in determining whether and to what extent the said A. B. will be damaged by the construction of said road. The real question for the jury is whether, in consequence of the building and operation of the road, the property in question will be diminished in value. *Blesch vs. C. & N. W. R. R.*, 48 Wis., 168.

If you believe, from the evidence, that there will necessarily be an increased danger to the premises in question from fire arising from the building and operation of the contemplated railroad, or that the cost of insuring the buildings thereon, with their contents, will be necessarily increased by the building and operating of said road, and that the (rental) value of the premises will be decreased in consequence thereof, then these are facts proper to be considered by you in determining the question of damage and the amount thereof, as regards said premises. *Lafayette, etc., Rd. Co. vs. Murdock et al.*, 68 Ind., 137; *Swinney vs. Ft. Wayne, etc., Rd. Co.*, 57 Ind., 205.

In assessing the claimant's damages your inquiry must be confined to the marketable value of his land before and after the right of way is appropriated, taking into account, in this connection, the number of acres taken for the right of way, the manner of its location, the way his land is cut by the railroad, and all other like matters appearing in evidence which affect the value of the land, so as to be able to estimate its true market value, as affected by the location of the railroad, before and after such location. The difference in the market value of the land before the appropriation of the strip for right of way and after the right of way is taken, will constitute the claimant's true measure of damages; provided you believe, from the evidence, that the property will be less valuable after the right of way is taken, in consequence of such taking. *Hartshorn vs. B. C. & N. R. Co.*, 52 Ia., 613.

If you find, from the evidence, that the claimant's farm consists of about (five hundred) acres of improved land, and that defendant's right of way cuts the same in such a manner as to injure the value of the same by the manner in which it is divided, then you are at liberty to consider all the circumstances and effects, if any, upon the lands, by reason of the location of the railroad thereon, and all the inconveniences, if

any, directly caused by the railway in determining the effect which the same would have upon the market value of the lands. You must bear in mind it is the depreciation in the market value of the premises, if any will result from the building and operation of the road, which is the true measure of damages, and for which you are to allow. You do not allow anything for the matters which cause such depreciation, except as you allow for them in allowing for the amount of the depreciation itself.

§ 5. **Appropriation of Streets.**—The court instructs the jury that as the owner of the lots and buildings in question, the said A. B. has a vested right of free access to and egress from the lots and buildings over and along P. street in front of the lots as the same are now located and used. That this is a right of property that cannot be materially improved or destroyed without his consent except upon payment to him of reasonable compensation therefor; and, therefore, if you believe, from the evidence, that the contemplated railroad will materially impair or injure the rights of ingress and egress in the transaction of business upon the premises in question, he is entitled to recover such damages as will compensate him for the injury. *Blesch vs. C. & N. W. Rd. Co.*, 48 Wis., 168; *Grand Rapids, etc., Rd. Co. vs. Heisel*, 38 Mich., 62; *Cent. Brance U. P. Rd. Co. vs. Twine*, 23 Kans., 585.

If you find, from the evidence, that the property of the said A. B. will be injuriously affected by the construction and operation of the contemplated railroad along in front of the said lots, then the measure of damages will be the difference between the value of the property without the railroad, and its value with the road built and in operation.

If the jury believe, from the evidence, that the running of the cars and locomotives on the street in front of the premises in question, in the usual and ordinary manner of operating such cars and locomotives, will create smoke and cinders and throw them upon the premises, so as materially to impair the reasonable use and enjoyment thereof, then you have a right to take these matters into consideration in determining whether or not the said A. B. will be damaged by the location and operation of the railroad; but said damages, if any, must

be actual damages, and they can only be considered for the purpose of determining whether the value of the property, with the road constructed, will be less than it would be without the railroad, and the extent of the depreciation in value, if any. *Chicago, etc., R. Co. vs. Hall*, 90 Ill., 42.

The jury are instructed, that if they find from the evidence that the plaintiff will enjoy any benefits peculiar to his land from the railroad being built on this street, such benefits must be deducted from his damages, if any are sustained by him; but such benefits as he will enjoy in common with the whole community must not be so deducted.

In estimating the damages arising from (the widening of the street) and the taking of the claimant's land therefor, the jury should allow as a set-off, any special benefits which will accrue to that portion of the lot not taken in consequence of (the widening of the street), provided, the jury believe, from the evidence, that any such special benefit will accrue therefrom. The benefits which may be thus deducted or set off, are such as are direct and special to the property of the claimant, but not general benefits shared by his land in common with other lands in the vicinity, or in common with other lots abutting on the same street, no part of which is taken. Benefits may be direct and special although other lots upon the same street similarly situated will be similarly benefited. *Parks vs. Hampden*, 20 Mass., 395; *Cross vs. Plymouth*, 125 Mass., 557.

If you believe, from the evidence, that the property in question is city property, and mainly valuable to be built up and occupied as a residence, or for building purposes, and that it is in such close proximity to the proposed railroad that the jar caused by the moving trains will affect the buildings standing thereon, or the noise, smoke or increased danger caused by the use of the railroad, will depreciate the market value of the property, then such matters are proper to be considered by you in estimating the amount of compensation to which the plaintiff is entitled. You are not to fix any definite estimate of the amount of damages arising from the several sources. The real question to be determined, is, what is the market value of the property as a whole without the railroad, and what will be the market value of the remainder

after the road is built and in operation, making no allowance for any general benefits which the property may derive from the building of the road and which it will share in common with other property generally, in the vicinity. The value of the property taken and the depreciation, if any, in the market value of the remainder, added together constitute the compensation to which the claimant is entitled in this proceeding. *In re N. Y. C. R. R.*, 15 Hun, 63; *Chicago, etc. R. Co. vs. Hall*, 90 Ill., 42.

In considering the claim for damages to the part of the lot not proposed to be taken, the question for the jury to determine is whether such remainder will be damaged by the proposed improvement, and if the jury believe, from the evidence, that the substitution of a street immediately in front of and adjoining such remainder in the place or instead of the strip of land proposed to be taken, will not decrease the value of such remainder below its value considered as a part of the lot before any portion was proposed to be taken, then the jury should not find any damages as to such remainder.

You are instructed that while you may and should consider the various theories or modes detailed by the witnesses by which they severally arrived at the amount of compensation to be made or the value of the land to be taken, you may adopt the theory or mode which appears to you to be the best and fairest, if not inconsistent with the rules of law as given in these instructions.

If you believe from the evidence that in any instance the diminution of a lot by this proposed improvement will impair the value of the part of the lot not taken, such impairment should be considered as an actual injury to the part not taken, and as the direct result of such taking, and for which, under the constitution and laws of this state, the owner is entitled to compensation, but he is only entitled, in this case, to recover as damages the excess of damage, if any, above the benefits, if any, which will accrue to the part not taken by reason of such improvement.

You are further instructed, as a matter of law, that the owner is entitled not simply to such compensation for the land taken as the land would sell for at forced sale, but to such sum as you believe from the evidence the land is fairly worth and

would bring in the market in the usual method of selling land at private sale.

You are not to understand, from any of the instructions given, that the value of the part of the lot to be taken is to be estimated at its value for use independently of the balance of the lot, but its value is to be estimated with reference to its use in connection with and as a portion of the property not taken.

CHAPTER XV.

CONTRACTS.

- SEC. 1. Capacity to contract.
2. Drunkenness.
3. Fraud and circumvention in procuring execution of contract.
4. Signature procured by fraud.
5. What constitutes a contract—Assent of parties.
6. What a contract of sale.
7. Consideration necessary to a valid contract.
8. What is a consideration.
9. New promise to perform a legal obligation.
10. Promise to receive part payment in full satisfaction.
11. Partial payment by a stranger.
12. Construction of contracts.
13. Contract modified.
14. Right to rescind contract for fraud.
15. Right to rescind for mistake of facts.
16. Notice of intention to rescind must be given, etc.
17. Rescinding by mutual consent.
18. Rescinding for non-performance.
19. Partial performance—Breach of contract.
20. Hardship will not excuse non-performance.
21. What is an act of God.
22. Burden of proving breach of contract.
23. Contract made on Sunday.
24. Marriage contract, how proved.
25. Unchastity no defense, when.
26. Desirability of parties contracting.
27. Breach of promise, how proved.
28. Promise obtained by fraud.
29. Offer to perform not necessary, when.
30. Subscription paper.
31. Composition agreement void—Fraud.
32. Sale of personal property—Future delivery.
33. No demand need be made, when.
34. Only act of God and public enemies will excuse non-performance.
35. Plaintiff must show readiness to perform.
36. Tender of performance.
37. Custom and usage enter into and form a part of the contract.

BUILDING CONTRACTS.

38. Certificate of architect.

§ 1. **Capacity to Contract.**—The jury are instructed, that the law presumes that all adult persons have sufficient intellectual capacity to transact business with ordinary intelligence, and the party alleging incapacity must overcome this presumption by a preponderance of evidence. 2 Pars. on Cont., 572; *McCarty vs. Kearnan*, 86 Ill., 291.

The court instructs you, that the legal presumption is, that all persons of mature age are of sound mind and memory, and this presumption continues until the contrary is shown by a preponderance of evidence. *Silly vs. Waggoner*, 27 Ill., 395.

The court instructs you, as a matter of law, that when the mind is so deranged that a person cannot comprehend and understand the effect and consequences of an act, or the business in which he may be engaged, then the law will relieve him from the consequences of his acts; but so long as he is possessed of the requisite mental faculties to transact rationally the ordinary affairs of life, he will not be released from the responsibility that rests upon the ordinary citizen. *Harris vs. Wamsley*, 41 Ia., 671; 2 Pars. on Cont., 572; *Titcomb vs. Vantyle*, 84 Ill. 372.

To establish such a want of mental capacity as will avoid a contract on that ground, there must be such a degree of mental derangement or imbecility of mind as will induce the belief that the party was incapable of comprehending the effect and consequences of his act in entering into the contract.

If a person is capable of reasoning correctly on the ordinary affairs of life, or is capable of comprehending and understanding the consequences which usually accompany ordinary acts, he will be held to be of sound mind, and be bound by his contracts. *Baldwin vs. Dunton*, 40 Ill., 188.

The court further instructs you, that mere mental weakness of one of the parties to a contract, is not sufficient to avoid the contract, or authorize the party to rescind it, if such weakness does not amount to an inability to comprehend and understand the terms and effect of the contract, unless it is accompanied by evidence of imposition or undue influence. *Ibid.*

§ 2. **Drunkenness.**—The court instructs the jury, as a matter of law, that to render a transaction voidable on account of the drunkenness alone of a party to it, it should appear, from the

evidence, that he was so drunk as to have drowned his reason, memory and judgment, and impaired his mental faculties to an extent that would render him wholly idiotic for the time being. *Bates vs. Ball*, 72 Ill., 108; *Cavender vs. Waddingham*, 5 Mo. App., 457; *Miller vs. Finley*, 26 Mich., 249; *Johnson vs. Phifer*, 6 Neb., 401.

If you believe, from the evidence, that the plaintiff procured intoxicating liquors and influenced the defendant to drink of the same until he became so intoxicated that he lost the rational use of his mental faculties, and so that he did not understand what he was doing, and, while he was in this condition, procured his signature to the contract in question, then such contract would be void as against the said defendant, and he is not bound thereby. *Mitchell vs. Kingman*, 5 Pick., 431; 1 Pars. on Cont., 383.

§ 3. **Fraud and Circumvention in Procuring Execution of Contract.**—If the jury believe, from the evidence, that the defendant was induced by the plaintiffs, or either of them, to sign the written contract offered in evidence, by the fraud and circumvention of said plaintiffs, or either of them, then such written contract is void as against the defendant, and he is only bound by the actual contract made between the parties, as shown by other evidence in the case.

If you believe from the evidence that, at the time the contract was made, the defendant was unable to read writing readily and understandingly, and requested the said ——— to read the said contract to him (or the said ——— proposed to read the same to him), and did so read it to the defendant; and if you further believe from the evidence that the said ———, when reading the said instrument, misread the same in any material part, and thus induced the defendant to sign the said contract, when he would not otherwise have done so, this would constitute fraud and circumvention within the meaning of the law, and such contract is not binding on said defendant, and the same is wholly void as to him.

§ 4. **Signature Procured by Fraud—Burden of Proof.**—If the jury believe from the evidence that the defendant signed the (*lease*) in question, then the covenants on his part therein con-

tained will be binding upon the defendant, unless the jury further believe from the evidence that he was induced to sign the same by some fraud practiced on him by the plaintiff; and such fraud must not be presumed by the jury without proof, it must be proved by a preponderance of evidence.

You are further instructed, that although you may believe from the evidence that the defendant signed the lease in question without reading the same over, still he cannot release himself from the performance of the covenants therein contained, unless you further believe from the evidence that the plaintiff fraudulently induced the defendant to sign said lease without reading it or knowing its contents.

§ 5. **What Constitutes a Contract—Assent of Parties.**—The court instructs the jury, that before there can be a contract between two parties, the minds of the two parties must come together and agree upon all the terms and conditions of the contract; or, as is sometimes said, the minds of the contracting parties must meet. 1 Par. on Cont., 475; *Baker vs. Johnson Co.*, 37 Ia., 186; *Steel vs. Miller*, 40 Ia., 402; *Davidson vs. Porter*, 57 Ill., 300.

You are instructed, that if one person makes a proposition to another, and the latter, without any formal acceptance of the proposition, enters upon the performance of it, and proceeds to avail himself of its benefits, he will be as fully bound as if he had in terms accepted the offer. *Miller vs. Manis*, 57 Ill., 126.

§ 6. **What a Contract of Sale.**—The jury are instructed, that to constitute a contract of sale of personal property, for future delivery, the minds of the two parties must meet and agree on the article to be sold, the price to be paid, the terms of the payment, and the time, place and terms of delivery of the property sold, so that each mind assents to all the requirements of the other; if any one of these matters is left open for further consideration and further settlement, there is no complete bargain.

§ 7. **Consideration Necessary to a Valid Contract.**—The court instructs the jury, that any promise, for which there is no consideration, cannot be enforced at law.

§ 8. **What is Consideration.**—The court instructs the jury, that whatever works a benefit to the party promising, or whatever works any loss or disadvantage to the person to whom the promise is made, although without any benefit to the promiser, is a sufficient consideration to support a contract or agreement. 1 Pars. on Cont., 430; 1 Pars. on N. & B., 175.

One promise is a good consideration for another promise, and if the jury believe, from the evidence, that at the time of the alleged contract the plaintiff promised and agreed with the defendant that he would, etc., and that in consideration thereof the defendant then agreed with the plaintiff that he would, etc., then one of these promises is a good consideration for the other, and the several agreements are binding upon the respective parties. *Dockray vs. Dunn*, 37 Me., 442; *Keister vs. Miller*, 25 Penn. St., 401; 1 Pars. on Cont., 448.

§ 9. **New Promise to Perform Legal Obligation.**—The court instructs the jury, that if one party promise another to do what he is already under legal obligation to perform, then such a promise is not a good consideration for a promise by the other party, and a promise by him upon such a consideration is not binding, and cannot be enforced against him by suit. 1 Pars. on Cont., 437; *Collins vs. Godefrey*, 1 B. & Ad., 950; *Early vs. Burt*, 68 Ia., 716; *Tucker vs. Vaughn*, 23 N. W. Rep., 846.

§ 10. **Promise to Receive Part Payment in Full Satisfaction.**—If the jury believe, from the evidence, that at the time of the alleged agreement interposed as a defense in this case, the defendant was indebted to the plaintiff in the sum of (\$100), and that that indebtedness was then due, then, although the jury may further believe, from the evidence, that the plaintiff promised the defendant that if he would pay (\$50) of such indebtedness within (*ten days*) from that date, he would take that as payment in full, and forgive him the balance of the debt; and further, that relying upon that promise, the defendant did, within ten days, pay the said sum of (\$50), still such promise on the part of the plaintiff was without consideration, and void as to him, and he is not bound thereby. 2 Pars. on Cont., 618; *Seymour vs. Minturn*, 17 Johns., 169; *Bryant vs. Brazil*, 52 Ia., 350.

§ 11. **Partial Payment by Strangers.**—Though the jury may believe, from the evidence, that, at the time of the alleged agreement for a settlement of the matter in controversy in this case, the defendant was indebted to the plaintiff in the sum of about (\$100), and that such indebtedness was then due, still, if the jury further believe, from the evidence, that at that time the plaintiff promised the defendant that if he would raise (\$50) and pay that sum on the indebtedness within (*ten days*) from that date, that he would take that amount as payment in full, and forgive him the balance of the debt; and further, that relying upon that promise, and in consideration thereof (*the father of defendant*) paid the plaintiff the said sum of (\$50,) then such payment by the father forms a good consideration for the promise of the plaintiff, and he is bound thereby. 2 Pars. on Cont., 619; *Boyd vs. Hitchcock*, 20 John., 76; *Kellogg vs. Richards*, 14 Wend., 116.

§ 12. **Construction of Contracts.**—The court instructs the jury, that when parties are making a bargain or entering into a contract, they will be held to mean and intend just what the language used commonly imports, as ordinarily used in reference to the subject matter of the contract, and not what either party may have secretly intended or meant. *Radell vs. Scharlan*, 66 Wis., 138.

Still, if the jury believe, from the evidence in this case, that, at the time of the making of the alleged contract in this case, the plaintiff said * * * and if the jury further believe, from the evidence, that the defendant understood plaintiff to say * * * and that, acting on that understanding, defendant replied * * * this language would not constitute a binding bargain or contract between the parties. *Nichols vs. Mercer*, 44 Ill., 250; 2 Pars. on Cont., 494.

§ 13. **Contract Modified.**—If the jury believe, from the evidence, that after the making of the written contract, the parties, by parol agreement, modified the same as to the time of performance, and as to the quality of, etc., to be delivered, and that the plaintiff performed the said contract as so modified, by delivering, etc., then both parties would be bound by the contract as thus modified. *Lee Grand Quarry vs. Reichard*,

40 Ia., 161; 1 Greenl. Ev., § 303, 304; *Cook vs. Murphy*, 70 Ill., 96; *Seaman vs. O'Hara*, 29 Mich., 66.

The jury are instructed, that although a sealed contract, while it remains in force and is to be performed, cannot be shown to have been changed by parol agreement, still, a contract under seal may be changed by a subsequent verbal agreement for the performance of additional work, or the furnishing of additional materials, or for the payment of an additional sum of money, and if the work is subsequently performed, or the material furnished in accordance with the terms of the contract, as thus changed, the change will be binding upon both the parties. *Barton vs. Gray*, 57 Mich., 622.

§ 14. **Right to Rescind Contract for Fraud.**—The law is, that if a party is defrauded in a contract by the false and fraudulent representations of the other party, he may elect whether he will stand by the contract or rescind it; he may stand by it and recover damages, if any, resulting from the fraud, or he may rescind the contract and recover back what he has paid. *Parker vs. Marquis*, 64 Mo., 38; *Watson C. & M. Co. vs. Casteel*, 68 Ind., 476; *Berringer vs. Beecher*, 58 Mich., 557.

You are instructed, that in order that representations may be regarded as fraudulent, so as to be a ground for rescinding a contract, they must be both false and fraudulently made. If they are made with an honest belief of their truth, at the time, they are not fraudulent; but if made recklessly, and without any knowledge or information on the subject calculated to induce such belief, and they prove to be untrue, then they are fraudulent within the meaning of the law. *Parmlee vs. Adolph*, 28 Ohio St., 10.

§ 15. **Right to Rescind for Mistake of Fact.**—The court instructs the jury, that where a contract is made under an honest mistake, as to a material fact affecting the right of the parties, it may be rescinded by the party sought to be charged, upon discovering such mistake; provided, that he is guilty of no want of diligence in not ascertaining what the real facts were. *Byers vs. Chapin*, 28 Ohio St., 300; 1 Story Eq. Jur., § 134; Pars. Cont., 460; *Montgomery Co. vs. Am. E. Co.*, 47 Ia., 91.

§ 16. **Notice of Intention to Rescind Must be Given, etc.**—The jury are instructed, that when a person intends to rescind a contract on the ground of fraud, or on the ground of mistake, he must give notice of his intention promptly, and as soon as it can reasonably be done after discovering the facts which entitle him to rescind, or else he will be held to have ratified the contract.

And in this case, whether the defendant gave the plaintiff notice of his intention to rescind the contract in question, and whether such notice was given as soon as it could reasonably be done after the alleged discovery of the fact, relied upon as giving the right to rescind, are questions of fact to be determined by the jury from the evidence in the case. *Parmlee vs. Adolph*, 28 Ohio St., 10; *Byers vs. Chapin*, 28 Ohio St., 300.

§ 17. **Rescinding by Mutual Consent.**—The jury are instructed, that all contracts may be rescinded by the consent of all the contracting parties, and this consent need not always be expressed in words. If either party, without right, claims to rescind the contract, the other party need not object; and if he permit it to be rescinded, it will be done by mutual consent. 2 Par. on Cont., 678.

§ 18. **Rescinding for Non-Performance.**—The jury are instructed, that when one party fails or refuses to perform his part of the contract, with an intention to abandon it, or disables himself from performing it, the other party may treat the contract as rescinded. 2 Par. on Cont., 678.

The court instructs you, as a matter of law, that a contract cannot be rescinded by one of the parties alone, for non-performance by the other, unless both can be restored to the condition in which they were before the contract was made; and if one of the parties has derived any advantage from a partial performance by the other, he cannot hold the benefit of this and rescind as to the residue, on the ground of the other's non-performance. 2 Par. on Cont., 679.

If you believe, from the evidence, that the plaintiff has made all the payments called for by the contract read in evidence, at the time and in the manner therein specified, except-

ing the last payment called for, and that when the last payment became due he tendered to the defendant the full amount thereof and demanded a deed of the premises; and further, that the defendant was then unable to convey the premises in question to the plaintiff by a good and sufficient deed in fee simple, and clear of all incumbrances, and that he failed and neglected so to do within a reasonable time thereafter, then the plaintiff had a right to treat said contract as rescinded, and to sue for and recover back the money so paid by him, with interest thereon at the rate of six per cent. per annum, unless it appears, from a preponderance of the evidence, that the parties, by some subsequent agreement, have modified or otherwise waived the terms of said original agreement.

If you believe, from the evidence, that before the time mentioned in the contract for the delivery of the deed, the lands mentioned in the contract had been sold for taxes, and a tax deed, under said sale, delivered and recorded among the land records of this county, then such tax deed would constitute an incumbrance on said land, and the plaintiff was not bound to accept the deed from the defendant until such tax title should be released or conveyed to the defendant.

You are instructed, that under the contract read in evidence, the plaintiff could not call upon the defendant for a deed until the plaintiff had paid or tendered the last payment mentioned in the contract, and unless it appears, from a preponderance of the evidence, that through no fault of the plaintiff, and after payment or tender of the entire amount of the purchase money, the defendant, upon demand, has refused or neglected to tender to the plaintiff a deed of the premises in question, the jury should find the issues for the defendant.

§ 19. **Partial Performance—Breach of Contract.**—The court instructs the jury, as a matter of law, that where two parties enter into a lawful contract upon sufficient consideration, and one of the parties is ready and willing to perform, and makes preparation to perform on his part, but is prevented from performing by the other party, the party so ready and willing to perform can recover all damages suffered by him by reason of the default of the other party, including necessary expenses incurred in making such preparation.

§ 20. **Hardship will not Excuse Non-Performance.**—The jury are instructed, as a matter of law, that where parties enter into a valid and lawful contract for the performance of an act not impossible in itself, then mere hardship, or even subsequent impossibility of performance, will not excuse a non-performance of the contract, unless the impossibility of performance arise from an act of God.

§ 21. **What an Act of God.**—The jury are instructed, that to make an act of God an excuse for not performing a covenant, or for not complying with the terms of a contract, performance must be impossible by or through any known exercise of human skill or power—something must occur which no ordinary skill or precaution could have foreseen or prevented. 2 Par. on Cont., 672; *Shear vs. Wright*, 60 Mich., 159.

[See *Act of God*.]

§ 22. **Burden of Proving Breach of Contract.**—The court instructs the jury, that to entitle the plaintiff to recover in this case he must prove, by a preponderance of evidence, the contract substantially as alleged in the declaration, and, also, the breach of the contract as therein alleged and charged, and unless he has done so, the jury should find for the defendant.

The court instructs you, that to entitle the plaintiff to recover in this case, he must prove every material allegation in his declaration by a preponderance of the evidence; he must show, by a preponderance of evidence, that (*here follow the charges in the declaration*).

§ 23. **Contract made on Sunday.**—The court instructs the jury, that so far as the law is concerned, parties can make a valid contract as well on Sunday as on any other day. And, in this case, if the jury believe, from the evidence, that the parties did agree, the one to sell the corn and the other to purchase it, that contract would be binding upon both the parties, although they themselves may have supposed that to make the contract binding they would have to meet on some other day to ratify it. *Moore et al. vs. Murdock et al.*, 26 Cal., 514; *Richmond vs. Moore*, 107 Ill., 429.

Contra: The court instructs the jury, that all contracts

made in this state on Sunday, though not absolutely void, are avoidable, and neither party can be bound to perform such a contract against his will. *Meriwether vs. Smith*, 44 Ga., 541; *Pike vs. King*, 16 Ia., 49; *Peake vs. Conlan*, 43 Ia., 297; 2 Pars. on Cont., 757. *Gilbert vs. Vachon*, 69 Ind., 372.

§ 24. **Marriage Contracts, How Proved.**—The court instructs the jury, that to prove a contract of marriage an expressed contract need not be shown. A mutual engagement may be inferred from constant and devoted attention, gladly welcomed, from reciprocal affection, and the interchange of letters expressive of earnest love. *Rockafellow vs. Newcomb*, 57 Ill., 186; 2 Pars. on Cont., 62; *Royal vs. Smith*, 40 Ia., 615.

The court instructs you, that the contract to marry may be proved by either positive or circumstantial evidence, and when it is proved, by one or the other mode; unless the evidence discloses facts absolving the party from its observance, the party must be held liable for its breach precisely as in the case of any other contract. *Wrightman vs. Coats*, 15 Mass., 1.

If you believe, from the evidence, that the defendant promised to marry the plaintiff, as alleged in the declaration, then no actual promise of the plaintiff need be shown. Evidence of her preparation for marriage and of her carrying herself as consenting to and approving his promise, if such evidence has been introduced, would be sufficient to establish a contract of marriage between the parties; provided you believe from such evidence that there was a marriage contract between the parties.

A contract of marriage like any other contract may be established either by express proof of the agreement or by the proof of circumstances from which it may reasonably be implied. The plaintiff to maintain an action for a breach of a marriage contract must show not only an express or implied promise to marry on the part of the defendant but she must also show by the evidence an ability and a readiness, or an offer to perform on her part; but these conditions also may be inferred by the jury as well as the promise itself from facts and circumstances proved on the trial; provided the jury believe from such facts and circumstances, together with all the evidence in the case, that the plaintiff was able, ready and willing to perform the contract on her part.

§ 25. **Unchastity no Defense, When.**—The court instructs the jury, that when a party enters into an engagement to marry with a knowledge that the other party is unchaste, he will be deemed to have waived the objection, and cannot afterwards set it up as a reason for his refusal to comply with his promise; but if either party shall be guilty of acts of unchastity subsequent to the engagement, the other party is absolved from the contract, whether such subsequent acts be known to the latter or not. 2 Pars. on Cont., 66; *Sprague vs. Craig*, 51 Ill., 288; *Denslow vs. Van Horn*, 16 Ia., 476.

§ 26. **Desirability of Party Contracting.**—The court instructs the jury that in actions of this kind the jury should not take into consideration the desirability of the defendant as a husband, nor whether the parties would be likely to live together happily or otherwise; that, in such cases, if there be a breach of promise to marry, the woman loses the husband, not as he might have been, but as he should be, under the circumstances proved.

§ 27. **Breach of Promise, How Proved.**—The jury are instructed, that under a declaration alleging a promise to marry upon request, direct and positive proof of request and refusal are not required; these may be inferred from circumstances, if the jury believe, from the evidence, that the circumstances proved are such as show that what passed between the parties was equivalent to a request and refusal. *Southard vs. Roxford*, 6 Cowen, 254.

You are instructed that under a declaration charging a promise to marry upon request, or within a reasonable time, such request need not necessarily be made by the plaintiff herself; and, in this case, if you find, from the evidence, that there was a valid subsisting contract of marriage between the plaintiff and defendant, and that no definite time was fixed by the parties in the contract, then the law would presume a contract to marry within a reasonable time; and if you further believe, from the evidence, that after the expiration of a reasonable time from the making of said contract, and before the commencement of this suit, the plaintiff herself, or any one authorized by her for that purpose, called upon the defendant

and requested him to marry the plaintiff, and that he refused and neglected to do so, then you should find the issues for the plaintiff.

And the court further instructs you that if they believe, from the evidence, that the father of the plaintiff, acting for her, for that purpose, called upon the defendant and requested him to marry the plaintiff, you may infer his authority to do so from his relationship to the plaintiff, and such request is as effectual for the purposes of this suit as though made by the plaintiff herself.

If you believe, from the evidence, that there was a mutual promise of marriage between the parties, that the plaintiff was able, ready and willing to perform the contract on her part and offered to perform it, and that the defendant absolutely refused to perform the contract or that his acts and conduct were such as to denote his refusal and intention not to marry the plaintiff, then the plaintiff was not required to request him to marry her or to make a formal offer to marry him to entitle her to recover in this case, unless you further believe from the evidence that the plaintiff consented to annul the contract, or that the defendant was justified in refusing to carry out the same for the reasons set out in the instructions given for the defendant.

Unless you believe, from the evidence, that the defendant entered into a contract, either expressed or implied, to marry the plaintiff, you must find for the defendant, and to entitle the plaintiff to recover she must prove such express or implied promise by a preponderance of evidence.

§ 28. **Promise Obtained by Fraud.**—Although the jury may believe from the evidence that the defendant agreed to marry the plaintiff, still, if they further believe, from the evidence, that defendant's consent to such marriage was obtained by fraud, then the defendant would not be bound by such promise. In determining the question of fraud it is proper for the jury to consider the evidence tending to show plaintiff's representations as to her previous character, and as to whether she had always been a single woman, if you find from the evidence that such representations were made to the defendant, that they were made for the purpose of inducing defendant to

enter into such contract and that he was induced thereby to enter into the same.

§ 29. **Offer to Perform not Necessary, When.**—The jury are instructed, that if they believe, from the evidence, that there was a valid contract for marriage between the plaintiff and defendant, as charged in the declaration, and that, while such contract was neither forfeited nor annulled by the plaintiff, the defendant married another woman, then the plaintiff need neither allege nor prove an offer to perform on her part; the law does not require a useless act.

You are instructed, that a promise to marry, without any specified time for such marriage being mentioned, is, in law, a promise to marry within a reasonable time; and if you believe, from the evidence, that such a contract for marriage existed between the parties to this suit, as is alleged in the — count of the declaration, and that a reasonable time had elapsed since the making of such contract, and before the commencement of this suit, and that the defendant unjustifiably failed on his part to fulfill such contract, or has married another woman, then you should find the issues for the plaintiff; and in case of the marriage of the defendant the plaintiff need not show a request to him to perform his part of his contract with her.

§ 30. **Subscription Paper.**—The court instructs the jury, that where money is promised to be paid upon a subscription paper, and the promise is based upon the fulfillment of certain conditions, or the performance of certain work, or the attainment of certain objects, set forth in the instrument subscribed, then the performance of the conditions, or the labor, or the attainment of the object, is sufficient consideration to support the promise to pay. *McCabe vs. O'Connor*, 63 Ia., 134.

And in such a case, it is not necessary that the parties named in the instrument should themselves perform the conditions; it is sufficient if, upon the faith of the subscription, the condition has been performed by some one. 1 Pars. on Cont., 452; *Congregational Society, etc., vs. Perry*, 6 N. H., 164; *Miller vs. Ballard*, 46 Ill., 377; *State, etc., vs. Cross*, 9 Vt., 289.

If you believe, from the evidence, that the defendant signed the subscription paper introduced in evidence, and that the plaintiff, on the faith of that subscription, went on and (*built the church*) and became personally liable for the cost thereof, and that the defendant has not paid his subscription or *pro rata* share thereof, you should find the issues for the plaintiff. *Pryor vs. Cain*, 25 Ill., 292.

If you believe, from the evidence, that the defendant attended a public meeting in the town of——, called for the purpose of adopting measures for (*building a church*) by private subscription, and that at that meeting the defendant and others publicly announced what they would severally give toward the undertaking and that the defendant then promised that he would give \$—— to have the said undertaking accomplished, and that the plaintiff, relying upon said promises so made by the defendant and others, went on and performed labor, or expended time and money, and completed the said ——, then said defendant would be liable in this action; if you find, from the evidence, that he has not paid the amount so promised by him, then you should find for the plaintiff. *Wilson vs. McClure*, 50 Ill., 366.

The court instructs you, that in this class of cases, if all the money subscribed was necessarily expended in securing the end designed, the several subscribers, if liable at all under the evidence, are liable for the full amount subscribed, less such sums as they have already paid thereon; but if the evidence shows that an amount less than the amount subscribed was necessarily expended, then the recovery should be limited to the *pro rata* share of the amount necessarily expended, less the sums, if any, already paid. *Miller vs. Ballard*, 46 Ill., 377.

§ 31. **Composition Agreement Void—Fraud.**—On effecting a composition agreement, the law demands the utmost good faith on the part of the debtor. He cannot be permitted to induce a creditor to accept a part of a debt in lieu of the whole, by pretending to be insolvent, when, in fact, he is not so, and thereby defraud his creditors out of a portion of their just debts.

Where a composition agreement is made, the debtor professes to deal with all the creditors who enter into it, on terms

of perfect equality, and if at the same time he has a secret agreement with one of the creditors, which gives him an undue advantage, this is a fraud upon the other creditors, which vitiates the composition agreement, and in such case a creditor, although he may have received the amount named in the composition agreement, may sue for and recover the full amount of his original demand, less the amount received under the composition agreement. *Hefter vs. Cahn*, 73 Ill., 296.

In this case, if you believe, from the evidence, that for the purpose of inducing any of his creditors who have signed the composition agreement, to sign the same, the said defendant made any secret or private agreement with such creditor, or any of them, by which they were to receive more, or obtain any advantages, other than as specified in such agreement, and that the said plaintiff, when he signed the same and received his dividend thereunder, had no knowledge of such secret agreement, these facts would render the same agreement fraudulent and void as to him, and he would have the right to sue for and recover the full amount of his original demand, less the amount received under the composition agreement.

And in this case, if you believe, from the evidence, that at or about the time that the plaintiff signed the composition agreement in question, the defendant stated and represented to the plaintiff that (*any matter as to his pecuniary condition*) for the purpose of inducing the plaintiff to sign the said agreement, and that the said plaintiff believed such statements and representations to be true, and was thereby induced to sign the said agreement; then, if you further believe, from the evidence, that the said statements and representations were not true, and that the defendant, at the time they were made, knew they were not true, then the plaintiff would not be bound by the said agreement, and he would have a right to sue for and recover the full amount of his original claim, less the amount received under the composition agreement. *Armstrong vs. M. N. Bank*, 6 Biss., 520; *Elfelt vs. Snow*, 2 Sawyer, 94.

§ 32. **Sale of Personal Property—Future Delivery.**—If the jury believe, from the evidence, that in the winter of 1879 the defendant sold to the plaintiff, and the plaintiff purchased,

the best sixty head of cattle out of defendant's herd, that he was then feeding, to be delivered to the plaintiff between the 1st and the 13th of the following March, the plaintiff, on such delivery, to pay therefor six cents per pound, gross weight, of said cattle; and if the jury further believe, from the evidence, that during the month of February the defendant sold and delivered to another person twenty head of cattle so sold, and thus put it out of his power to comply with his said agreement, and that plaintiff was ready and willing to take and pay for the cattle so purchased by him at the time stipulated in said contract, and that the plaintiff has sustained damages from defendant's failure to deliver the cattle as agreed, then the defendant is liable to the plaintiff in this action, and the measure of damages is the difference, if any, between such contract price and what the cattle were worth at the time and place when and where they were to have been delivered by the terms of the contract.

If you believe, from the evidence, that in the fall of 18—, the defendant made a contract with the plaintiff for the sale and delivery to him of one thousand bushels of number two wheat, at \$— per bushel, to be delivered at plaintiff's place of business, in the city of S., at any time during the then next month of April, whenever the plaintiff should demand the same, the price to be paid as the grain was delivered; and further, that during the said month of April, the plaintiff demanded of the defendant the delivery of said wheat, and was then ready and willing to pay for the same as fast as it should be delivered, and that the defendant refused or neglected to deliver the grain in accordance with such demand; and if you further believe, from the evidence, that at the time of such demand the market price of such wheat at the said city of S. was more than the said agreed price, then you should find for the plaintiff. *Sleuter vs. Wallbaum*, 45 Ill., 43.

§ 33. **No Demand Need be Made, When.**—If the jury believe, from the evidence, that the defendant made with the plaintiff the agreement set out in either count of the plaintiff's declaration, and that before the time for the delivery of the cattle the defendant put it out of his power to comply with said agreement, on his part, then it was unnecessary for the plaintiff to

make a demand for the cattle in order to fix the defendant's liability; provided, it further appears, from the evidence, that the plaintiff was ready and willing to take and pay for the cattle, at the time and place agreed upon.

§ 34. **Only Act of God, or Public Enemies, will Excuse Non-Performance.**—The court instructs the jury, that where a person makes a contract to do a thing which is in itself possible to be done, he will be liable for a breach of such contract, notwithstanding it was beyond his power to perform it. *Walker vs. Tucker*, 70 Ill., 527.

The court instructs you, as a matter of law, that where a person contracts to sell stock (grain or other personal property), and deliver the same at a specified place, upon a specified day, inclemency of the weather, bad condition of the roads, sickness, or other unforeseen contingency, furnishes no excuse for the non-performance of the contract, unless it be expressly so provided in the contract. *Kritzing vs. Sanborn*, 70 Ill., 146.

[See Act of God.]

§ 35. **Plaintiff Must Show Readiness to Perform.**—The court instructs the jury, as a matter of law, that in a suit by a purchaser of articles of personal property, to be delivered to him at a certain time and place, in order to recover damages for non-delivery, it is necessary for the plaintiff to prove that he was ready and willing to receive and pay for the same at such time and place. *Kritzing vs. Sanborn*, 70 Ill., 146.

If you believe, from the evidence, that the defendant made with the plaintiff such a contract for the delivery of grain, as is set forth in either of the counts of the plaintiff's declaration, and that the plaintiff was ready and willing to receive such grain and pay for the same, as stated and alleged in such count; and if you further believe, from the evidence, that the defendant failed to perform his part of the contract, as alleged in the same count of the declaration, without fault on the part of the plaintiff, then the defendant is liable in damages for such breach of the contract on his part, if any damages have been thereby sustained by the plaintiff.

And, in such case, the measure of damages is the difference between the contract price and the market value of the same

grain at the time and place where it should have been delivered under the contract. *Metz vs. Albrecht*, 52 Ill., 491.

The court instructs you, that while in a suit by a purchaser of personal property, to be delivered at a certain time and place, it is necessary, in order to recover damages for non-delivery, for the plaintiff to prove that he was ready and willing to receive and pay for the property at such time and place, still, it is not necessary that these facts should be proved by direct testimony thereto; they may be proved by the facts and circumstances appearing in evidence on the trial, if they are of a character to satisfy the jury that such was the case.

When, by the terms of a contract, the two acts of selling and delivering, and receiving and paying, are to be done at the same time, then, in an action for non-delivery, it is only necessary for the plaintiff to show that he was ready and willing to receive the property and pay for it at the time and place agreed upon, and this may be proved by the facts and circumstances appearing in evidence on the trial, if they are of such a character as to satisfy the jury that the plaintiff was so ready and willing to take and pay for such property.

§ 36. **Tender of Performance.**—The jury are instructed, that if one party to a contract is able and ready, and offers to perform the agreement on his part, but is prevented from performing by the other party, then such offer will be treated as excusing non-performances by the party offering, and he may recover the damages, if any, sustained in consequence of not being allowed to perform on his part.

§ 37. **Custom and Usage Enter Into and Form Part of a Contract.**—The court instructs the jury, as a matter of law, that when a contract is entered into, the parties are supposed to have reference to the known usages and customs which enter into and govern the business or subject matter to which the contract relates, if there are any such usages and customs, unless such presumption is rebutted by the agreement itself.

Such customs as are universally known to exist, enter into and form a part of every contract to which they are applicable, although they are not mentioned or alluded to in the contract. 2 Pars. on Cont., 636; *Hughes vs. Stanley*, 45 Ia., 622; *Page*

vs. *Cole*, 120 Mass., 37; *Carter vs. Phila. Coal Co.*, 77 Penn. St., 286; *Castleman vs. S. M. Ins. Co.*, 14 Bush., 197.

Although the usages of trade cannot be set up to contravene an established rule of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs of such trade, if any such exist. *Loneragan vs. Stewart*, 55 Ill., 44.

A usage of trade, in order to be binding upon the parties, must be generally known and established among those who are engaged in the business where the usage is claimed to exist, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both the contracting parties, and that they contracted in reference to it, and in conformity to it. *Lyon & Co. vs. Culbertson*, 83 Ill., 33; *Coffman et al. vs. Campbell & Co.*, 87 Ill., 98; *Couch vs. The Watson Coal Co.*, 46 Ia., 17; *Basch vs. Pollock*, 41 Mich., 64.

The court instructs you, that a custom, to be binding as such, must be general and uniform in the place or in the branch of business where it is claimed to exist. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known. *Leggat et al. vs. Sands A. Co.*, 60 Ill., 158; *Randall et al. vs. Smith*, 63 Me., 105.

BUILDING CONTRACTS.

§ 38. *Certificate of Architect, etc.*—If the jury believe, from the evidence, that the contract read in evidence was made by and between the plaintiffs and defendant and that plaintiffs did the work and furnished the material for the building to the satisfaction of the architects named therein, and that the same was so certified by him, then the verdict should be for the plaintiff upon that contract for the amount due thereon after deducting payments and set-offs allowed by the architects, provided, the jury believe, from the evidence, that there is any amount due thereon, after deducting such payments and set-offs.

The law is that where a contract for building a house provides that the work shall be done under the direction of an architect

therein named, the price agreed upon to be paid upon his certificate that the, etc., then the certificate of such architect made in compliance with the agreement, is conclusive on the rights of the parties. And if such contract also provides that the architect's opinion, decision and certificate, shall in all matters pertaining to such contract and the erection of such building be binding and conclusive, then the certificate of such architect, if made in compliance with such contract, is conclusive on the parties, and his decision cannot be varied or appealed from unless for fraud or mistake on the part of the architect.

NOTE.—The necessity for producing the architect's certificate may be waived. *Hayden vs. Coleman*, 73 N. Y., 567.

By the terms of the contract introduced in evidence the plaintiffs were to do the brick work and plastering on the defendant's building therein mentioned under the superintendence of the architect therein named, and payments were to be made upon estimates by such architect, from time to time, as the work should progress, not exceeding eighty-five per cent. upon the work done, and when all the work should be done and completed and so certified to by the architect, then the whole amount of the contract price or balance thereof unpaid, should be paid, and in order to entitle the plaintiffs to recover for any final balance under such contract or for any additional work done under the direction of such architect under the provision of the contract, it is incumbent upon the plaintiffs to prove that such final certificate was issued by the architect and that the same had been presented to the defendant and payment thereunder demanded. *Schenke vs. Rowell*, 7 Daly (N. Y.), 286; *Sullivan vs. Byrne*, 10 S. C., 122.

CHAPTER XVI.

DIVORCE.

- SEC. 1. Residence and desertion.
2. Husband has the right to select the residence.
3. Provocation for the wife leaving—Abusive language.
4. Separation by mutual consent.
5. Absence alone not proof of desertion.
6. Separation by mutual consent—Desire for reconciliation.
7. Grounds of desertion by wife.
8. Adultery excuse for desertion.
9. Cruelty as an excuse for desertion.
10. Acts of cruelty must be apprehended at the time.
11. Adultery as a ground for divorce.
12. Adultery must be proved.
13. Extreme and repeated cruelty, ground for divorce.
14. Drunkenness and threats.
15. Personal violence must be shown.
16. Personal violence not necessary, in some States.
17. Acts of cruelty must be repeated.
18. Acts of cruelty must be recent.
19. Reason for cruelty must exist when the bill is filed.
20. Acts of cruelty provoked by complainant.
21. Cruelty provoked by a refusal to cohabit.
22. Hysteria.
23. Complainant laboring under a delusion.
24. Burden of proof.
25. Condonation.

NOTE.—The following instructions, relating to the subject of divorce, have been prepared more especially with reference to the statute of Illinois relating to divorce and the decisions under that statute; but, with very slight changes, they can generally be adapted to the laws of most of the other states.

§ 1. **Residence and Desertion.**—The jury are instructed, that in law the domicile of the husband is that of the wife, and her residence follows that of the husband. When a husband acquires a new home, it is the duty of the wife to go with him, and if she refuses, without justification, for two years, the husband will be entitled to a divorce. *Kennedy vs. Kennedy*, 87 Ill., 250; *Hunt vs. Hunt*, 29 N. J. Eq., 96.

§ 2. **Husband has the Right to Select the Residence.**—That the husband has the right to select his domicile, and to change his residence, and it is the duty of the wife to accompany him, and if she refuses without some good and justifiable cause, as explained in these instructions, he will not be guilty of deserting his wife by selecting and going to a new home and leaving her behind. *Babbit vs. Babbit*, 69 Ill., 277; 1 Bishop on M. and D., § 788; *Ashbaugh vs. Ashbaugh*, 17 Ill., 476.

§ 3. **Provocation for the Wife Leaving—Abusive Language.**—That while the statute has not made abusive language, and the application of coarse and vulgar epithets, a cause for divorce, yet such conduct on the part of the husband toward his wife, and charging her with a want of chastity without cause, if proved, is sufficient to justify her in abandoning him, and in living separate and apart from him. Bishop on M. and D., § 726.

You are instructed, that the only question presented by the issues in this case is, whether or not complainant and defendant were living together as husband and wife, at, etc., on, etc., and whether or not, at that time, the defendant willfully, and without just or reasonable cause, deserted the complainant and his home, and has willfully remained absent therefrom, without just and reasonable cause, for the space of two years prior to the filing of the complainant's bill in this case.

§ 4. **Separation by Mutual Consent.**—The jury are instructed, that where a husband and wife, by mutual consent, agree to separate and live apart, and, pursuant to such agreement and consent they do live separate and apart from each other, this will not constitute such a desertion as is required under the statute as a ground for divorce. *Cox vs. Cox*, 35 Mich., 461; 1 Bishop on M. and D., § 783. *Beller vs. Beller*, 50 Mich., 49.

§ 5. **Absence Alone not Proof of Desertion.**—The jury are instructed, that absence alone does not constitute desertion. To constitute desertion, within the meaning of the law, there must not only be absence, but this must be coupled with

an intention, on the part of the party charged, to desert and permanently abandon the other party; and in this case, if the jury find from the evidence, that when the defendant left this state, he went away with the intention of providing another home for himself and wife, and of afterwards sending for her, or of returning and taking her with him to his new home, this would not amount to a desertion, although continued for more than two years. *Swan vs. Swan*, 15 Neb., 453.

And in such case, before the complainant will be entitled to a divorce on the ground of desertion, the jury must further believe, from the evidence, that after defendant left he changed his mind, and then determined not to come or send for complainant, but did intend, from that time, to desert and abandon her, and that such change or intention occurred two years or more before the commencement of this suit. 1 Bishop on M. and D., § 783.

§ 6. Separation by Mutual Consent—Desire for Reconciliation.—Although the jury may believe, from the evidence, that at one time the parties to this suit separated, by mutual consent, still, if the jury further believe, from the evidence, that afterwards the complainant desired to renew her marriage relations with the defendant, and in good faith sought a reconciliation, and expressed a desire to have him return and live with her, and that he refused to accord to that request, then, from that time, defendant's absence, if proved, would constitute a desertion, and if continued for a period of two years, without justifiable cause, as explained in these instructions, would be good ground for a divorce in favor of complainant. 1 Bishop on M. and D., § 786.

Although you may believe, from the evidence, that some time about, etc., defendant professed a desire to be reconciled to complainant, and requested her to return and live with him, still, if you further believe, from the evidence, that this request was coupled with the qualification or condition that, etc., such a qualification or condition was one that complainant was under no obligation to assent to, and such an offer, if proved, can not avail the defendant anything in this suit. 1 Bishop on Mar. and Div., § 786.

§ 7. **Grounds of Desertion by Wife.**—The jury are instructed, that adultery on the part of the husband, if known to the wife (*or extreme and repeated cruelty, or habitual drunkenness for the period of two years*), if proved, is a good and sufficient cause to justify a wife in leaving her husband and living separate and apart from him. Schouler's Dom. Rel., 90; *Stevens vs. Story*, 43 Vt., 327; *Hancock vs. Meirick*, 10 Cush., 41; *Rea vs. Durkee*, 25 Ill., 503.

§ 8. **Adultery Excuse for Desertion.**—The jury are instructed, that adultery ought not to be presumed, without proof, but it should be clearly established by a preponderance of the evidence in the case; and unless the jury believe, from the evidence in this case, that the complainant did, prior to defendant's leaving him, or during her absence, commit adultery, then the defendant was not justified in leaving complainant and remaining absent from him for the space of two years—if the jury believe, from the evidence, that she did so leave and remain absent—simply because of any suspicions of adultery which she may have entertained, in respect to her husband and (*these women, or either of them*).

You are instructed, that if you believe, from the evidence, that at the time defendant left complainant—if you believe, from the evidence, she did so leave, as charged—complainant was the head of a family consisting of, etc., and continued to live with such family, then he had a perfect right to employ a housekeeper during that time, and to associate with her in all ways that are usual with men and virtuous females, and to visit his neighbors and female acquaintances; and these facts alone, if proved, would afford no evidence that he was guilty of adultery with such persons.

§ 9. **Cruelty as an Excuse for Desertion.**—The court instructs the jury, as far as relates to the alleged acts of cruelty, that if they believe, from the evidence, that the defendant did leave the complainant, and remained away from him, as charged in the bill, then to justify such leaving and absence, upon the ground of cruel treatment, the jury must believe, from the evidence, that the complainant actually committed an act, or acts, of personal violence to the person of the defendant,

prior to the time of the alleged desertion; and that abusive language, or violent sallies of passion, is not such violence as will justify desertion, if desertion has been proved; nor would threats of violence justify the alleged desertion, if it has been proved, unless they were made under such circumstances as would justify a reasonable apprehension of bodily injury in case she remained. Bishop on M. and D. § 795, *et seq.*

You are instructed, that such cruelty as would authorize a married woman to leave the house and home of her husband, must be acts of physical violence inflicted by him upon her person; or such demonstrations or threats of actual violence, made by him toward her, as would induce a well-grounded fear in a reasonable mind that such violent injuries would be inflicted upon her by her husband in case she remained. *Carter vs. Carter*, 62 Ill., 439.

§ 10. **Acts of Cruelty Must be Apprehended at the Time.**—With reference to the alleged acts of cruelty, which are claimed to have justified defendant's wife in leaving him, the court instructs the jury, that it is not material what had formerly been the treatment of his wife by the defendant, if the jury believe, from the evidence, that after all the improper treatment had ceased, she continued to live with him, without complaint or objection; and if there was no repetition of bad treatment at the time she left, and no reasonable ground to fear or apprehend such treatment, at the time she left, then the law presumes that the former offenses, if there were any, had been forgiven, and they would not justify her in leaving.

§ 11. **Adultery as a Ground for Divorce.**—The court instructs the jury, that on a charge of adultery, as a ground for divorce, a preponderance of evidence is sufficient to establish the charge. It is not required that the jury be satisfied of the truth of the charge beyond a reasonable doubt. *Chestnut vs. Chestnut*, 88 Ill., 548.

§ 12. **Adultery Must be Proved.**—The jury are further instructed, that the law does not allow the jury to presume the adultery of the defendant, if the facts or circumstances relied upon to establish it may as well be attributed to an innocent

intent or motive as to a guilty one. *Blake vs. Blake*, 70 Ill., 618.

Where adultery is charged, as a ground for divorce, the act charged is one that tends to degrade the parties, and inflicts great injury upon society, and if the facts shown by the evidence may as well be explained upon the hypothesis of innocence as of guilt, then you should always adopt the former rather than the latter hypothesis. *Chestnut vs. Chestnut*, 88 Ill., 518.

§ 13. **Extreme and Repeated Cruelty as a Ground for Divorce.**—The court instructs the jury, that the extreme and repeated cruelty required to constitute a cause for a divorce, must be physical harm as contradistinguished from harsh or opprobrious language, or even mental suffering. The cruelty must be grave, and subject the person to great bodily harm. *Henderson vs. Henderson*, 88 Ill., 248.

A single act of cruelty does not constitute sufficient grounds for a divorce. There must be extreme and repeated cruelty, which must consist in physical violence, and not merely angry or abusive epithets or profane language; angry or abusive words, menaces or indignities do not constitute cruelty, within the meaning of our statute. *Embre vs. Embre*, 53 Ill., 394.

§ 14. **Drunkenness and Threats.**—If the jury believe, from the evidence, that during the time when defendant is charged with cruelty, he was guilty of drunkenness from time to time, and when intoxicated, was in the habit of making threats of personal violence against the complainant, then these are facts which the jury have a right to consider, in connection with all the other evidence in the case, in determining whether defendant has been guilty of extreme and repeated cruelty toward the complainant, and also, whether she had reasonable cause to apprehend bodily harm, or danger to life or limb, at the time she filed her bill in this case.

If you believe, from the evidence, that the defendant, for a period of two years prior to the beginning of this suit, was frequently and customarily, or habitually given to the excessive use of intoxicating drink, and had, during said two years, or more, lost the power or the will, by the frequent indul-

gence, to control his appetite for it, then the defendant is guilty of habitual drunkenness. *Richards vs. Richards*, 19 Ill. App., 465; *Pratt vs. Pratt*, 34 Vt., 323; *Com. vs. Whitney*, 5 Gray, 85; *Ludwick vs. Com.*, 18 Penn. St., 174; *Magahay vs. Magahay*, 35 Mich., 210; *Murphy vs. People*, 90 Ill., 59.

§ 15. **Personal Violence Must be Shown.**—That when a charge of extreme and repeated cruelty is the ground of application for divorce, unkind treatment, threats of personal violence, abusive language and opprobrious epithets, if proved, without personal violence, do not constitute that degree of extreme and repeated cruelty which the law requires, to authorize a decree of divorce for that cause.

To authorize a divorce, on the ground of extreme and repeated cruelty, the acts complained of must consist of physical violence, or such as constitute bodily pain and suffering. Mere angry or abusive words, profane language, menaces or indignities, do not constitute cruelty, within the meaning of our Illinois statute.

§ 16. **In some States Personal Violence not Necessary.**—If the jury believe, from the evidence, that recently before the commencement of this suit the defendant was in the habit of using profane, obscene and insulting language towards the complainant in the presence of her mother and little children (or others) to such an extent as to render her life miserable, then this would constitute extreme cruelty for which our statute authorizes a divorce. *Goodman vs. Goodman*, 26 Mich., 417; *McClung vs. McClung*, 40 Mich., 493; *Kennedy vs. Kennedy*, 73 N. Y., 369.

That to justify a verdict in favor of complainant actual physical violence need not be proved, provided the jury believe, from the evidence, that there is reasonable ground to believe that if the complainant is compelled to live and cohabit with the defendant as his wife her life or health will be endangered by his wrongful treatment of her. *Black vs. Black*, 30 N. J. Eq., 215.

If the jury believe, from the evidence, that the defendant was in the habit before and at the time of the commencement

of this suit of using violent, coarse and abusive language to complainant and subjecting her to aggravating annoyances and humiliating insults to such an extent as to endanger her health or life, then this would be legal cruelty authorizing a verdict in her favor. *Latham vs. Latham*, 30 Gratt. (Va.), 307.

The jury are instructed that the degree or kind of cruelty that authorizes a divorce is any wrongful conduct on the part of the defendant which tends to the bodily harm of complainant, or involves danger to her health or life. And although the jury may believe, from the evidence, that the defendant has been in the habit of using angry words and coarse, violent and abusive language towards the complainant, or of subjecting her to aggravating annoyances or humiliating insults, still, if the jury further believe, from the evidence, that these things merely tended to wound the feelings of the complainant, but were not accompanied by any bodily injury or threatened danger to life or health, they would not amount to legal cruelty. *Henderson vs. Henderson*, 88 Ill., 248; *Latham vs. Latham*, 30 Gratt. (Va.), 307.

§ 17. **Acts of Cruelty Must be Repeated.**—That a single act of cruelty, if proved, does not constitute a sufficient ground for a divorce. There must be extreme and repeated cruelty, and the acts of cruelty, to authorize a divorce, must be done so recently before the filing of the bill, or under such circumstances, as to justify the complainant in reasonably apprehending, at the time that the bill is filed, that the acts of violence or cruelty will be repeated if she continues to live with the defendant in the relation of husband and wife. And it must also appear from the evidence that the acts of cruelty complained of were not provoked by the wrongful acts of the complainant, or if they were so provoked, that they were out of all reasonable proportion to the provocation.

§ 18. **Acts of Cruelty Must be Recent.**—Even if the jury should believe, from the evidence, that the defendant has been, at some former time, guilty of extreme and repeated cruelty towards the complainant, still, if they believe, from the evidence, that for several years after that, and before the filing of this bill, the parties had lived together as man and wife,

and that defendant's treatment of his wife, before and at the time of the filing of the bill, was such that she had no reasonable ground for apprehending a repetition of cruel treatment when the bill was filed, the jury should find the defendant not guilty.

§ 19. **Reason to Fear Cruelty Must Exist When Bill is Filed.**—The court further instructs the jury, that to authorize a verdict in this case for the complainant, the jury must believe, from the evidence, that before and at the time the bill in this case was filed, the treatment of the complainant by the defendant was such as to constitute what the law deems extreme and repeated cruelty; or in case such extreme and repeated cruelty has been practiced before, then such a state of facts and circumstances must appear from the evidence as afforded a reasonable ground for the complainant to believe that she would, in the future, receive from her husband such a degree of bodily injury as to render it improper for her to continue to live with him; and unless the jury believe, from the evidence, that there was, at the time the bill in this case was filed, reasonable ground for the complainant to apprehend such cruel treatment from the defendant in the future, then they should find for the defendant.

To authorize a divorce, upon the ground of extreme and repeated cruelty, there must be acts or threats made recently before the filing of the bill; or the circumstances must be such as to raise a reasonable apprehension of bodily hurt, and show a state of personal danger of injury, incompatible with the duties of married life, at the time the bill is filed.

The court instructs you, that the ultimate question for them to decide is, whether, at the time the bill in this case was filed, the defendant had been guilty of extreme and repeated cruelty, and whether, at that time, the complainant had reasonable cause to fear a continuance of such treatment; and in determining these questions, the jury should not be influenced in their judgment by any considerations other than such as bear directly on these questions; the jury have nothing to do with any questions affecting the rights of the parties to property, or their future means or manner of support.

If you believe, from the evidence, that the defendant had

been guilty of cruel treatment towards the complainant, at some considerable time prior to her leaving the defendant, and of the filing of the bill in this case, this fact alone will not authorize a verdict for the complainant; it must also appear, from the evidence, that at the time the complainant filed her bill in this case, she had reasonable cause to apprehend a repetition of such treatment in the future.

The courts do not grant divorce on the ground of cruel treatment, as a punishment of offenses long since committed; when they do grant divorces upon that ground, it is to prevent the commission of such offenses in the future.

§ 20. **Acts of Cruelty provoked by Complainant.**—If the jury believe, from the evidence, that defendant has been guilty of acts of violence against the complainant, still, if they further believe, from the evidence, that such acts were provoked by complainant's misconduct, then the jury should not find the defendant guilty, by reason of such acts of violence; provided, such misconduct is proven to have existed, and to have been of such character as might be reasonably expected to provoke the acts charged against the husband. 1 Bishop on M. and D., § 764; *Skinner vs. Skinner*, 5 Wis., 449; *Harper vs. Harper*, 29 Mo., 301.

The law will not authorize the granting of a divorce, on the ground of extreme and repeated cruelty, if the acts complained of were inflicted under wanton provocation on the part of the complainant, or if they were only the working of ordinary human passion, brought into exercise by the misconduct of the complainant, unless the violence of the defendant, in such case, is out of all reasonable proportion to the provocation.

The law will not permit a person, by her misconduct, to wantonly provoke injury, and make the injury thus received a ground for divorce, unless the injury is out of all reasonable proportion to the provocation. The law considers, in such cases, that the person complaining has the remedy for all ordinary injuries in his own hands, and that there is no occasion to resort to a court of equity. 1 Bishop on M. and D., §§ 764 *et seq.*; *King vs. King*, 28 Ala., 315.

Although the jury may believe, from the evidence, that the

defendant did use force and violence against the complainant, still, if the jury further believe, from the evidence, that complainant was guilty of misconduct of such a character as might be reasonably expected to provoke such acts of force and violence, and that the complainant purposely incited and provoked such acts of violence with the object and purpose of affording her a pretended ground or excuse for commencing a suit for divorce, and that such acts of force and violence were not out of reasonable proportion to the provocation but were only such as ordinarily reasonable men would be likely to employ under similar circumstances, then the jury are instructed that their verdict should be for the defendant.

§ 21. **Cruelty Provoked by a Refusal to Cohabit.**—The court instructs the jury, that if they believe, from the evidence, that the complainant unreasonably, and without sufficient cause, refused to accord to the defendant the marriage rights of cohabitation, and that the treatment complained of was provoked by such refusal, then the complainant is not entitled to a verdict in this cause, unless it appears, from the evidence, that the injuries complained of were out of all proportion to such provocation.

The law imposes upon the husband and wife the duty of according, each to the other, the right of sexual intercourse, to a reasonable extent, unless there be some physical cause rendering such indulgence improper or unhealthful, and that a withholding of such right, if prompted or induced by motives of dislike, or without proper cause, if proved, is such conduct as the jury may properly consider in determining whether there was provocation for the cruelty charged or proven.

§ 22. **Hysteria.**—The court instructs the jury, that if they believe, from the evidence, that at the time that the offenses charged in the bill are alleged to have been committed, the complainant was suffering from attacks of hysteria, and that the tendency of that disease is to partially derange the mental faculties, and to blunt the moral sensibilities, and to give a person false and exaggerated views and impressions of what is actually occurring around them; and if the jury further believe, from the evidence, that the mind of the complainant at these

times was so affected, then these facts are proper to be taken into consideration by the jury, in connection with all the other evidence in the case, in determining what degree of credibility should be attached to her testimony relating to the commission of such offenses.

The court instructs you, that the testimony of the doctors (*and the medical works introduced in evidence*) is competent and legal evidence of the facts stated (*in the books*) and testified to by the doctors, and should be treated by the jury as evidence in the case, and considered by them in connection with all the evidence in the case in arriving at a verdict.

§ 23. **Complainant Laboring under a Delusion.**—If the jury believe, from the evidence, that the complainant, before and at the time she commenced this suit, had been, and that she is still laboring under a delusion, that she was and is in danger of bodily hurt from the defendant, and if the jury further believe, from the evidence, that such delusion, if it existed, was unfounded, and that no real cause for such fear on the part of complainant existed at the time of the filing of the bill, or at any time since, and that this suit and the prosecution of it by her are the product of such delusion, then you are instructed, that you should find a verdict for the defendant.

§ 24. **Burden of Proof.**—The court instructs the jury, that the complainant is bound to establish her case by preponderance of evidence; and unless she has done so, the jury should find the issues for the defendant.

The law requires that the complainant, to entitle her to a verdict, shall establish her case by a preponderance of evidence; and if the jury find the testimony so contradictory, or so evenly balanced, that they are unable to arrive at a satisfactory conclusion as to the truth or falsity of the charges against the defendant, then the jury should find the issues for the defendant.

§ 25. **Condonation.**—The court instructs the jury, that in the case of condonation, there is an express or implied agreement that the party forgiving does so only on the condition that the party forgiven will not repeat the offense, but will, in the

future, perform all the marital duties the relation imposes. *Kennedy vs. Kennedy*, 87 Ill. 250; *Sharp vs. Sharp*, 116 Ill., 509.

That condonation is forgiveness upon condition that the injury shall not be repeated, and it is dependent upon future good usage and conjugal kindness; and it must be free, and not obtained by force and violence or by fraud. 2 Bishop on M. and D., § 33.

You are further instructed, that condonation of personal acts of violence and cruelty may be avoided by abusive language, and the use of opprobrious epithets. A wife having forgiven her husband's acts of physical cruelty, may, from the subsequent use of abusive and brutal language, and charges of infidelity, conclude that it will end as on former occasions, in personal violence, and she is not bound to wait and submit to personal violence. *Farnham vs. Farnham*, 73 Ill., 497.

The court instructs you, that the law is, that if the injured party, husband or wife, cohabits with the other, subsequent to an adulterous offense, the party injured having the ability to prove the fact, it will be a bar to a proceeding for divorce for that offense, the offense being considered as thereby condoned; but the court further instructs you, that condonation is always accompanied with the implied condition that the injury shall not be repeated, and that the offending party will thereafter treat the other with conjugal kindness, or the offense will be revived. *Davis vs. Davis*, 19 Ill., 334; 2 Bishop on M. and D., § 43.

CHAPTER XVII.

EJECTMENT.

- SEC. 1. Only legal titles involved.
2. One in possession of real estate presumed to be the owner.
 3. Paper title shown by plaintiff.
 4. Right to possession must be shown.
 5. Title can only be conveyed by deed.
 6. Title deduced from a common source.
 7. Both parties claim under "J. W."
 8. Priority of deeds.
 9. Visible monuments control courses and distances.
 10. Boundary on watercourse.
 11. Boundaries a question of fact for the jury, and not for the surveyor.
 12. Plaintiff's deed by way of mortgage.
 13. Possession *prima facie* evidence of title.
 14. First possessor has the better title.
 15. Deed from party in possession claiming title.

ADVERSE POSSESSION.

16. Title by prescription—Without color of title.
17. Must be hostile in its inception.
18. Permissive possession not hostile.
19. Possession subservient to the true owner.
20. Possession presumed to be under legal title.
21. Paper not necessary.
22. Possession by successive holder.
23. Deed not necessary to transfer possession.
24. Temporary line fence.
25. Line fence agreed upon.
26. Division line agreed upon through mistake.
27. Possession under color of title—Payment of taxes—Illinois.
28. Burden of proof—Limitation.
29. What must be shown under limitation law.
30. What constitutes possession.
31. Possession of wood lands.
32. Enclosure by natural objects.
33. Possession not under color of title.
34. Possession according to boundaries in title papers.
35. Notice by possession.

§ 1. **Only Legal Titles Involved** (*Where Common Law Rule Prevails*).—The court instructs the jury, that in an action of ejectment it is only the legal rights of the parties, as distinguished from their equitable rights, that the jury have a right to consider. In this case, if the plaintiff shows a legal title to the premises in controversy, as explained in the following instructions, then no equitable right in the defendant will bar the plaintiff's right of recovery. *Tyler on Eject.*, 36, 564; *Sims vs. Gray*, 66 Mo., 613; *Dawson vs. Hayden*, 67 Ill., 52; *Buell vs. Irwin*, 24 Mich., 145; *Whyte vs. Smith*, 4 Sawyer (Oreg.), 17; *Phillpotts vs. Blasdell*, 8 Nev., 61; *Kelley vs. Hendricks*, 57 Ala., 193.

§ 2. **One in Possession of Real Estate Presumed to be Owner.**—That while it is true that, to entitle the plaintiff in ejectment to recover, he must not only show title in himself, but he must also show that he was entitled to the possession of the premises at the commencement of the suit, still, the law is, that the one who shows the better legal title to real estate is always presumed to be entitled to the possession of the property, unless the other party shows some valid legal right to the possession of the property, as against the true owner. *Thompson vs. Burhans*, 15 Hun (N. Y.), 581.

§ 3. **Paper Title Shown by Plaintiff.**—The court instructs the jury, that the deeds and papers introduced in evidence by the plaintiff, in this case, are sufficient to vest the legal title to the whole of the (*description of the land*) in the plaintiff, and to authorize him to take the possession of the whole of that tract of land, as bounded by the government survey lines, unless the defendant has shown an adverse possession to the same, or to some part thereof, as explained in these instructions, for a period of twenty years or more, before the commencement of this suit.

§ 4. **Right to Possession must be Shown.**—The jury are instructed, that to entitle the plaintiff to recover in this case, it is not sufficient for him to show that he holds the legal title to the premises in controversy; it must further appear, from a preponderance of the evidence, that at the time of the com-

mencement of this suit, the plaintiff was then entitled to the possession of the premises. *Kilgour vs. Gockley*, 83 Ill., 109; *Gustin vs. Barnham*, 34 Mich., 511; *Lotz vs. Briggs*, 50 Ind., 346; *Williams vs. Murphy*, 21 Minn., 534; *San Felipe, etc., vs. Belshaw*, 49 Cal., 655.

§ 5. **Title Can Only be Conveyed by Deed.**—The jury are instructed, that there is no method known to the law for selling real estate, so as to convey the legal title from one person to another, except by deed, in writing and under seal, executed and delivered by the person holding the legal title, or else executed and delivered by some one authorized, in writing and under seal, by the person holding the legal title, to make such deed for and in the name of such owner. (*In some states a seal is dispensed with by statute.*)

§ 6. **Title Deduced from a Common Source.**—The court instructs the jury, as a matter of law, that where both parties, in an action of ejectment, claim to derive title through or under the same person, then neither party is bound to show title back of that person, and the one having the better title or right from that common source has the better title for all the purposes of the suit. *Miller vs. Hardin*, 64 Mo., 545; *Spect vs. Gregg*, 55 Cal., 198; *Morrison vs. Wilkerson*, 27 Ia., 374; *Cronin vs. Gore*, 38 Mich., 381; *Whisenhunt vs. Jones*, 78 N. C., 361.

§ 7. **Both Parties Claim under "J. W."**—The jury are instructed, that in this case both parties claim title to the land in question by conveyances from one "J. W.," and the party showing in himself the earlier and better title to the premises from the said J. W. must be regarded by the jury as the legal owner of the premises for all the purposes of this suit.

That the deed introduced in evidence in this case, from J. W. and wife to the plaintiff, McK., is sufficient to vest the legal title of the premises in McK. from the time it was delivered to him; and the certificate of recording indorsed on the back of said deed is sufficient evidence that the deed was filed for record on the, etc.; and the deed from McK. and wife to R. M. is sufficient to vest a legal title to an undivided half

of the premises in question in the said R. M. from the time that deed was made and delivered to him.

§ 8. **Priority of Deeds.**—The court further instructs the jury, that the deed from J. W. and wife, having been made and delivered to the defendant after the deed from the said J. W. and wife to McK. was recorded, the plaintiffs must be deemed to have the better legal title, so far as their respective titles depend upon the deeds introduced in evidence.

If you believe, from the evidence, that after McK. had received his deed, and had had it recorded, the defendant also took a deed for the same land from the said J. W., and went into possession under that deed, and made lasting and valuable improvements on the land without any authority from the plaintiffs, or either of them, then the taking of such possession, and the making of said improvements, will not affect the plaintiff's right to recover in this suit. Compensation for such improvements, if any ought to be made, will be determined hereafter in future proceedings before this court.

§ 9. **Visible Monuments Control Courses and Distances.**—The jury are instructed that in determining the boundary line between two tracts of land, if there are visible monuments fixed on the ground and referred to in the deed as marking the boundary, and these can be ascertained, they will control the courses and distances, if the line indicated by the monuments differs from that called for by the courses and distances given in the deed. *Watson vs. Jones*, 85 Penn. St., 117.

§ 10. **Boundary on Watercourse.**—The rule of law is that where two persons own land adjoining, on the same side of the stream or river, and are both bounded by the river, the presumption of law is that each owns to the middle of the stream in front of his own land, and if the shore line dividing their lands does not strike the river at right angles to the stream the boundary line from the shore to the middle of the river is determined by extending the division line at the point where it strikes the shore perpendicularly to the general course of the stream opposite that point, that is, running the line from the point where it strikes the shore to the nearest point

in the center of the river. *Clark vs. Campaw*, 19 Mich., 325; *Bay City G. L. Co. vs. Industrial, etc.*, 28 Mich., 182.

The court instructs you, as a matter of law, that where a stream of water, such as a river or creek, is the boundary line between two adjoining owners, and the stream alters its channel from year to year, by a slow, gradual and almost imperceptible wear upon one side and accretion on the other, then the boundary shifts with the channel; but if the stream changes its course visibly and violently, making what is known as a cut-off in high water, then the boundary does not change with the stream, but it adheres to the original channel. *Collins vs. The State*, 3 Tex. App., 323.

§ 11. **Boundaries a Question of Fact for the Jury and not for the Surveyor.**—The jury are instructed that the question in this case is not how would an accurate survey locate these lots in question, but how did the original survey and stakes locate them. The only purpose of the evidence of the surveyors, who have made the recent surveys, is to enable the jury to locate the original boundaries, if possible, and not for the purpose of determining where they ought to have been, or where they would have been by an accurate survey. The original starting points and boundaries are questions of fact for the jury to find from the evidence, not only the evidence of the surveyors, but all the other evidence in the case bearing upon these points. *Diehl vs. Zanger*, 39 Mich., 601; *Stewart vs. Carleton*, 31 Mich., 270; *Cronin vs. Gore*, 38 Mich., 381.

§ 12. **Plaintiff's Deed by Way of Mortgage.**—So far as regards this suit, it can make no difference whether the deed to the plaintiff was by way of mortgage to secure the payment of a sum of money or not. If it was so made, it was sufficient to vest the legal title to the premises in McK., and his deed to R. M. was sufficient to vest the legal title to an undivided half of the premises in said M., and these two deeds are sufficient to enable the plaintiff to sustain this action, unless the jury find, from the evidence, under the instruction of the court, that the defendant had some right to the possession of the property other than such as he acquired by his alleged purchase from the said J. W. under the deed introduced in evidence by the defendant. *Biggen vs. Bird*, 55 Ga., 650.

If you believe, from the evidence, that McK.'s deed was given to him by way of mortgage, or to secure the payment of money, and that since that time the money so secured has all been paid, or settled up, between the parties, these facts alone would not prevent the plaintiff from recovering in this suit; such payment or settlement, if proved, might, in another suit, entitle the defendant to a reconveyance of the land from the plaintiff, but until such reconveyance the plaintiff remains the legal owner of the land.

Even though you may believe, from the evidence, that the deed from J. W. to the plaintiff McK. was made by way of mortgage, or to secure the payment of money loaned, that circumstance alone would not affect the plaintiff's right to recover in this case. The deed, though a mortgage, would still be sufficient to vest the legal title to the land in McK.; provided, the jury find, from the evidence, that J. W. was the owner of the property when he made the deed.

§ 13. **Possession Prima Facie Evidence of Title.**—The court instructs the jury, that in an action of ejectment, prior peaceable possession by the plaintiff claiming to be the owner in fee, if proved, is *prima facie* evidence of ownership and seizin, and is sufficient to authorize a recovery unless the defendant shall show a better title. *Sherwood vs. St. Paul, etc., Rd. Co.*, 21 Minn., 127; *Burger vs. Hobbs*, 67 Ill., 592; *Davis vs. Thompson*, 56 Mo., 39.

A person in the actual peaceable possession of real estate is presumed to be the owner of the fee, until the presumption is rebutted, and he is not required to show in what manner, or by what title, he holds, until the plaintiff shows a better title. *Doty vs. Burdick*, 83 Ill., 473; *Sears vs. Taylor*, 4 Col., 38.

Open, visible and actual possession and occupation of real estate by a person claiming to be the owner, is *prima facie* evidence of title in the person so in possession. The words *prima facie* evidence, mean evidence sufficient to establish title, unless some person shows a better title.

If you believe, from the evidence, that for some years before, and up to the time that J. W. delivered the deed of the land in question to the plaintiff McK., the said J. W. was

in the actual, open and visible possession and occupation of the lands in question, claiming to be the owner thereof, this would be sufficient evidence to show title in him at the time the deed was made, and the deed from him to plaintiff, introduced in evidence in this case, would be sufficient to vest the title to said lands in the plaintiff, unless the defendant has shown a prior or better title, as explained in these instructions.

§ 14. **First Possessor has the Better Title.**—When both parties, in an action of ejectment, claim title to the premises by showing simply possession at different times, under claim of ownership, then the first person is deemed to have the better title, unless he delays for an unreasonable length of time to assert his right to the property. *Martin vs. Bonsack*, 61 Mo., 556; *Clark vs. Clark*, 51 Ala., 498; *Lum vs. Reed*, 53 Miss., 73; *Jones v. Easley*, 52 Ga., 454; *Southmayo vs. Henley*, 45 Cal., 101.

§ 15. **Deed from Party in Possession Claiming Title.**—The court instructs the jury, that if they believe, from the evidence, that J. W., before and up to the time of the making of the deed to the plaintiff, was in the actual possession of the property, claiming to own the same, then his deed to the plaintiff was sufficient *prima facie* to vest the title in the plaintiff as against the defendant; and if the jury further believe that that deed was recorded in the recorder's office of this county, etc., and, also, that after that date the defendant went into the possession of the land without any right or license from the plaintiff, or from some person authorized by him to give such right or license, then the jury should find the issues for the plaintiff.

ADVERSE POSSESSION.

NOTE.—As a general rule, adverse possession for the statutory period without color of title, will bar a recovery by the person holding the record title. In many of the states, questions connected with the subject of adverse possession, are determined by the presence or absence of color of title; and these distinctions should be borne in mind.

§ 16. **Title by Prescription—Without Color of Title.**—The court instructs the jury, that by the laws of this state, if a

person goes into the possession of real estate, under a claim of title, and continues in the open, exclusive, and uninterrupted possession of the premises under such claim of title, for the period of (*twenty*) years, he will be deemed to be true owner thereof. *Walbrun vs. Ballen*, 68 Mo., 164; *Delong vs. Mulcher*, 47 Ia., 445.

If the true and real owner of land permits another to take possession of the land, claiming it as his own, and to continue such possession, openly and publicly, under such claim of title, for a period of (*twenty*) years or more, such possession will ripen into a right and title in the possessor, and forever after prevent such true owner from taking possession of the property; but in order to have this effect, the commencement of the possession must have been hostile to the rights of the true owner, and must be continued, openly and publicly, for the full period of (*twenty*) years, under a claim of ownership, during all that time. *Peterson vs. McCullough*, 50 Ind., 35; *Bradley vs. West*, 60 Mo., 33; *Ambrose vs. Raley*, 58 Ill., 506; *Yelverton vs. Seel*, 40 Mich., 538; *McCarde vs. Barricklow*, 69 Ind., 356.

§ 17. **Must be Hostile in its Inception.**—The jury are instructed, that adverse possession, sufficient to defeat the legal title, must be hostile in its inception, and continue uninterruptedly for (*twenty*) years; it must be open, and of such a character as to clearly show that the occupant claims the land as his own and all of these things must be proved by a preponderance of evidence.

Although you may believe, from the evidence, that one A. B., more than twenty years before the commencement of this suit, built a fence around the land in question (*or otherwise improved it*), this alone does not show adverse possession in him. To constitute adverse possession, it must further appear, from the evidence, that what he did on the land was not with the leave or permission of the owner, but was done under a claim of right in himself, and in hostility to the right of the owner. *Russell vs. Davis*, 38 Conn., 562; *Foster vs. Letz*, 86 Ill., 412.

§ 18. **Permissive Possession not Hostile.**—The jury are in-

structed, that if a person enter into the possession of the lands of another, with the consent of the owner, for any other purpose except to claim the land as his own, such possession alone, no matter how long it is continued, will never bar the right of the owner to take possession of his land when he sees fit to do so. *Collins vs. Johnson*, 57 Ala., 304.

§ 19. **Possession Subservient to the True Owner.**—Where possession of real estate is taken under a claim consistent with or in subordination to the title of the real owner, nothing but a clear, unequivocal and notorious disclaimer of the title of such owner will render such possession adverse. Tyler on Eject., 217.

§ 20. **Possession Presumed to be under Legal Title.**—The court instructs the jury, that where one person is shown to have the legal title to land, and another person is shown to be in possession of the property, if there is no evidence to the contrary, the law presumes that such possession has been with the consent of the owner, and not in hostility to his rights; and if the person in possession sets up a claim to the land by virtue of such possession, the burden of proof is on him to show affirmatively, by a preponderance of the evidence, not only that he has been in the open, public, and notorious possession, but it must further appear, from the evidence, that such possession was commenced and continued in hostility to the true owner, and under a claim of right as against him; and these matters must be shown by clear and affirmative proof of such facts as show that such possession was taken and continued in hostility to such owner; they cannot be made out by inference without such proof. Tyler on Eject., 860.

The rule of law is that if a person enters upon land without any title or claim or color of title, the law will adjudge the possession to be in subservience to the legal owner and no length of such possession will render the holding adverse to the title of the true owner. But if a man enters on land without title, claim or color of title and he does not, in fact, go in under the true owner, and such person after acquires what he considers a good title, from that moment his possession becomes adverse. *Buckley vs. Taggart*, 62 Ind.,—; *Jackson vs. Thomas*, 16 Johnson, 293; *Harvey vs. Tyler*, 2 Wal., 328.

§ 21. **Paper Title not Necessary.**—It is not essential that a party, who takes possession of lands and holds adversely to the owner, should enter under a deed, or other written title, to cause the limitation of (*twenty*) years to run in his favor. It is sufficient if the party take possession under claim of ownership, and hold adverse possession, as explained in these instructions, for the period of (*twenty*) years. *Webber vs. Anderson*, 73 Ill., 439.

The court instructs you, that in order to maintain a defense to this action, under the twenty years' limitation law, it is not necessary that the defendant had a deed, or other written evidence of title; but if, under a claim of title or ownership, the defendant took actual possession of the land in question, and has held actual, notorious and exclusive possession of the land in question for a period of (*twenty*) years prior to the commencement of this suit, claiming title thereto, then the plaintiff is not entitled to recover.

The court further instructs you, that when a party enters into the possession of land, which is vacant and unoccupied at the time, claiming it as his own, such possession is hostile in its inception to the owner; and when such possession is hostile in its inception, and continues adversely for the period of (*twenty*) years, and is visible, notorious and exclusive during that period of time, such facts, if proved by the defendant, are a legal defense in an action of ejectment.

If you believe, from the evidence, that the defendant entered upon the land in question, claiming to be the owner, and continuing in the actual, visible and notorious possession of the same for a period of (*twenty*) years, under a claim of ownership, then the plaintiff is not entitled to recover.

§ 22. **Possession by Successive Holders.**—The court instructs the jury, that to constitute adverse possession, as explained in these instructions, for the period of (*twenty*) years, it is not necessary that the same person should himself have been in possession of the premises for the whole of that period; it is sufficient if the evidence shows that he and those under whom he holds, either as heir or purchaser, have held such possession for the full period of twenty years.

You are instructed, that although you may believe, from

the evidence, that one A. B. went into possession of the lands in controversy, more than (*twenty*) years before the commencement of this suit, and held the same adversely to the rights of the plaintiff, still the defendant, in this case, cannot avail himself of the possession of the said A. B., unless it further appears, from the evidence, that when the defendant took possession of the land, he acquired the rights of the said A. B., by purchase or otherwise.

§ 23. **Deed not Necessary to Transfer Possession.**—The jury are instructed, that a deed is not necessary to transfer the possession of land held adversely, from one person to another, and when one person succeeds to the possession of another, and it becomes necessary to connect the possession of the two, in order to make the period required by law to bar the owner's rights, the transfer of possession may be shown by parol evidence; in such cases no deed is required. *Webber vs. Anderson*, 73 Ill., 439.

§ 24. **Temporary Line Fence.**—In this case, if the jury believe, from the evidence, that the defendant was allowed by the owner of the property in controversy to take possession of it, and to build the division fence off the line, as a matter of convenience to the parties, without any agreement or intention to make that fence the permanent boundary line between their adjoining lands, and that the defendant took possession with the consent of the owner, as a matter of temporary convenience, and without any understanding that the property should thereafter belong to the defendant, then such possession, no matter how long continued, will not bar the right of the plaintiff to claim and take possession of the land, if he has otherwise shown himself entitled to the same.

If you believe, from the evidence, that the fence in question, claimed by the defendant to be the line fence between his land and that of the plaintiff, does not stand upon the true survey line between said lands; and if you further believe, from the evidence, that the fence was placed where it now is by agreement of the parties, merely for the convenience of working the land, and not for the purpose of marking the boundaries according to title, then neither party would be bound

by the existence of the fence, as establishing either an agreed boundary line or adverse possession to the lands in controversy. *Soule vs. Barlow*, 49 Vt., 329.

§ 25. **Line Fence Agreed Upon.**—The jury are instructed, that it is perfectly competent for parties owning adjoining lands to settle, by agreement, where the division line shall be.

And, in this case, if you believe, from the evidence, that the plaintiff and defendant owned adjoining tracts of land, of which the land in controversy formed a part, and that they mutually agreed upon the dividing line, and established it as between themselves, and afterwards occupy according to such line, then it is wholly immaterial where the survey would put the line, as each party would be bound by his agreement.

And in determining whether there was such an agreement and establishing of the line, it is competent for you to take into consideration the acts and statements of the parties, the acts done by each, and the fixing and adjustment of fences, and improvements by them, under such alleged agreement, if any such are proved, together with all the other evidence and facts and circumstances proved on the trial. *Cutler vs. Callison*, 72 Ill., 113; *Tamm vs. Kellogg*, 49 Mo., 118; *Smith vs. Hamilton*, 20 Mich., 433; *Terry vs. Chandler*, 16 N. Y., 354; *Joice vs. Williams*, 26 Mich., 332.

You are instructed that the fact, if proved, that a line fence was built on the line claimed by the defendant as the agreed line, and that the parties occupied up to the fence for a number of years, would not alone prove that the fence was built upon the true line, or that that line was established by agreement of the parties, or by the persons under whom they hold. In order that that line shall be conclusive upon the parties, the jury must believe, from the evidence, either that the fence was built upon the true line, that the adjoining owners in an honest attempt to fix the dividing line between their lands, agreed upon that line as the boundary line between them, or that the defendant, for twenty years or more, occupied the land in controversy adversely, as explained in these instructions upon that point. *Chapman vs. Cooks*, 41 Mich., 595.

§ 26. **Division Line Agreed upon Through Mistake.**—The law

is that where parties agree upon a division line between their lands, and they occupy up to such line for a period of twenty years, they will be held to the line so established, although the line be not the true line, and was agreed upon by mutual mistake. *Smith vs. McKay*, 30 Ohio St., 409; *Futzer vs. Thoman*, 17 Ohio St., 130; *Bader vs. Zeise*, 44 Wis., 96.

The law is that if two adjoining proprietors occupy on the opposite sides, and up to what they both erroneously suppose to be the true dividing line, with no intent on the part of either to claim beyond the true line, such possession would not be an adverse possession of the land thus erroneously occupied. *Houx vs. Batteen*, 68 Mo., 84.

You are instructed, as a matter of law, that where one of two adjoining land owners has possession for over twenty years of a portion of the other's land, by reason of the division fence not being on the line, such possession will not bar a recovery of the land by the true owner, unless the fence was agreed upon as the boundary line, and the possession taken and held in pursuance of such agreement, or unless such possession is adverse to the title of the true owner, as explained in these instructions upon that point. *McNamara vs. Seaton*, 82 Ill., 468.

§ 27. **Possession under Color of Title—Payment of Taxes—**Illinois.—The court instructs the jury, that the statute of this state provides that every person in the actual possession of lands, under claim and color of title made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during that time, pay all taxes legally assessed on such lands, shall be held and adjudged to be the legal owner thereof to the extent and according to the purport of his paper title; and all persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes, so as to complete the same possession and payment of taxes for the said term of seven years, are entitled to the benefit of the same statute.

§ 28. **Burden of Proof—Limitations.**—The jury are instructed, that where a party sets up the statute of limitations to bar an

otherwise legal title, the law holds him to a strict compliance with every requirement of the statute, and if he fails to prove such compliance, the statute will avail him nothing.

The court instructs you, that the burden of proof is upon the party setting up the statute of limitations to bar a recovery by the person holding the paper title to lands, to show affirmatively, by a preponderance of evidence, the payment by him, or some one for him, of all taxes legally assessed upon the land, and under color of title for seven successive years; and in this case, if the jury believe, from the evidence, that the defendant has failed to show color of title in himself, or in those under whom he holds, together with payment of all the taxes legally assessed in each and every year for seven successive years, by the person or persons having such color of title, then the statute of limitations cannot avail the defendant.

That when the benefit of the statute of limitations is claimed under color of title and payment of taxes for seven successive years, the party claiming such benefit must show affirmatively the payment of all taxes legally assessed on the premises in question during said period, and if he fails to show the payment of any such tax, no matter how small in amount it may be, the benefit of the statute must fail.

§ 29. **What Must be Shown Under Limitation Law.**—The court instructs the jury, that three things must concur in order that the statute of limitations, set up by the defendant in this case, may avail as a bar to the plaintiff's right of recovery; provided, you believe, from the evidence, under the instruction of the court, that the plaintiff has shown title, by deed, to the premises in question in himself:

1st. There must be what is called in law, color of title; or, in other words, a conveyance, purporting on its face to convey the title to said premises to the defendant, or to some one under whom he claims.

2d. The defendant, or some party under whom he claims, or the defendant, together with such person, must have had actual possession of the premises in controversy for the space of seven successive years previous to the commencement of this suit.

3d. That the person having the color of title must have paid all the taxes legally assessed against the said premises during said period of seven years; and if the jury believe, from the evidence, that either of these three things are wanting, the statute of limitation cannot avail as a defense.

The court instructs you, as a matter of law, that, as regards the premises known and described as, etc., the defendant has not shown any conveyance or color of title to himself, or to any one through whom he claims, made seven years before the commencement of this suit; and so far as these premises are concerned, the statute of limitations, set up in this case, cannot avail the defendant.

§ 30. **What Constitutes Possession.**—The court instructs the jury, that it is not necessary that land should be inclosed with a fence, or that a house should be erected upon, or that it should be reduced to cultivation, to constitute possession of it. Such improvements or acts of dominion over the land, as will indicate to persons residing in the immediate neighborhood, who has the exclusive control and management of the land, will be sufficient to constitute possession.

That where land is appropriated to such uses as it is naturally fitted for, and the manner in which it is used, by the persons claiming title, is such as to notify the public that such person has asserted dominion over it, this will constitute possession. *Hubbard vs. Kiddo*, 87 Ill., 578.

§ 31: **Possession of Woodland.**—The jury are instructed, that the rule of law is, that when the land in controversy is a timber lot, and it is exclusively controlled and used to supply a farm in the neighborhood with fuel, or with posts and rails, this will constitute possession, although the land does not join the farm and is not inclosed.

You are instructed, that actual possession of land may arise in any of the different ways of improving it, and which are open and notorious in their character, and which show an intention to appropriate it to some useful purpose, and indicate an exclusive use and control of the property by the person claiming possession.

The possession of land may be held in different modes—by

inclosure, by cultivation, by the erection of buildings or other improvements, or in any mode that clearly indicates an exclusive appropriation of the property by the person claiming to hold it. *Truesdale vs. Ford*, 37 Ill., 210.

§ 32. **Inclosure by Natural Objects.**—If the jury believe, from the evidence, that a slough on the east side of the premises in question served substantially for the purpose of a fence, and, in connection with other fences, made an inclosure of said premises, the slough should be considered a fence, and the field an inclosed field, for the purpose of this trial. *Brumagim vs. Bradshaw*, 39 Cal., 24.

The court instructs you that a person may take and hold possession of property by inclosing the same, and for that purpose it is not necessary that a fence should surround every portion of the land. The boundaries of a portion thereof may be protected by a fence, and the remainder defined and protected by natural objects, such as a lake, a river or other water-course, and such objects, when they are apparent and serve the purposes of a fence, are as effective in defining the limits of possession as a fence.

§ 33. **Possession not under Color of Title.**—The court instructs the jury, that where a person claims possession of real estate without a deed or instrument in writing calling for boundaries, his possession will not extend beyond what he has inclosed or actually occupies. *Ege vs. Medlar*, 82 Penn. St., 86; *Peterson vs. McCullough*, 50 Ind., 35; *Ill. C. Rd. Co. vs. Ind. & Ill. C. Ry. Co.*, 85 Ill., 211.

You are instructed, that when a person has neither title nor color of title to an inclosed tract of land, the fact that he, during several years, cut fire-wood, and made rails from the timber on it for the use of his farm, does not necessarily show actual possession. Such acts, if isolated and only occasional, may as properly be referred to continuous acts of trespass as indicating possession. To constitute possession, such acts should be exclusive and under claim of title. *Austin vs. Rust*, 73 Ill., 491; *Sepulveda vs. Sepulveda*, 39 Cal., 13; *Miller vs. L. J. Rd. Co.*, 71 N. Y., 350; *Pullen vs. Hopkins*, Lea (Tenn.), 741; *Williams vs. Wallace*, 78 N. C., 354.

Though you may believe, from the evidence, that the defendant went upon the land in question in the spring of, etc., for the purpose of taking possession of the whole tract, and make improvements thereon, claiming the whole tract, still, if the jury further believe, from the evidence, that at that time defendant had no deed, lease or other written evidence of title to the premises, then such possession, in law, is confined to the quantity of ground actually taken possession of by the defendant. *Humphries vs. Huffman*, 33 Ohio St., 395.

§ 34. **Possession According to Boundaries in Title Papers.**—The court instructs the jury, that where a party has title, or color of title, to woodland, and uses the land for the purpose of obtaining wood for fuel or fencing, for a farm in the neighborhood, under a claim of ownership, this will constitute a possession; and so, if a person holding a deed for land, enters and clears off, breaks up or improves a part, with intent to follow up such act with other improvements on the land, this will be a possession of the whole. *Wilson vs. Williams*, 52 Miss., 487; *Scott vs. Delaney*, 87 Ill., 146; *Barger vs. Hobbs*, 67 Ill., 592; *Fugate vs. Pierce*, 49 Mo., 441.

If you believe, from the evidence, that some time on or about, etc., the defendant went onto a portion of the land in controversy, under his deed, introduced in evidence, and broke up a portion of the land, and that at that time there was no one else in the actual possession of said tract, or any part of it, then such breaking and possession would extend to all the land embraced in his deed. *Blanchard vs. Pratt*, 37 Ill., 243; *Humphries vs. Huffman*, 33 Ohio St., 395; *Lynde vs. Williams*, 68 Mo., 360.

You are instructed, that a party who enters into the possession of real estate, under a conveyance from a person having no title, or under a paper purporting to be a deed, but having no seal, is presumed to enter according to the description in such deed or paper, and his occupancy of a part, claiming the whole, is construed as a possession of the entire tract which the instrument or paper purports to convey.

The jury are instructed, as a matter of law, that if a person enters upon uninclosed and unimproved land under color of title which describes the extent of his claim by metes and

bounds, and he actually improves and occupies a part thereof adversely to the true owner, claiming the whole tract, this will be held to constitute possession of the whole tract, to the extent of the boundaries in his paper title, although a portion of the tract may not be actually improved or occupied by him, provided no other person is in the actual possession of the part not occupied or improved by him.

§ 35. **Notice by Possession.**—The jury are instructed, that possession under an unrecorded deed, to be notice to subsequent *bona fide* purchasers, must be open, visible and exclusive; and must be such as to apprise the community that the occupant has appropriated the property to his own exclusive use.

That where a person is in the actual, open and notorious possession of land, claiming to own the same, this would afford notice to the world of all his rights and equities in the same. *Strong vs. Shea*, 83 Ill., 575; *Franklin vs. Newsome*, 53 Ga., 580.

That when a party is in the actual, open and visible possession of land, under an unrecorded deed, his possession will afford notice to the world of his rights to the land, whatever they may be, equally with that which would have been given by the recording of his deed. *Walden vs. Gridley*, 36 Ill., 523; *Spitler vs. Scofield*, 43 Ia., 571.

CHAPTER XVIII.

ESTOPPEL.

- SEC. 1. General rule.
2. Intention not essential.
3. Knowingly permitting another to deal with property as his own.
4. Representation by the acts of a party.
5. Representations must be acted upon.
6. Must be a fraudulent purpose or result.
7. Injury must be shown.

§ 1. **General Rule.**—The court instructs the jury, that as a general rule, a party will be estopped from denying his own acts and admissions, which were expressly designed to influence the conduct of another, and which did so influence it, and when such denial will operate to the injury of the person so acting. 1 Greenlf. on Ev., § 207; *Kinnear vs. Mackey*, 85 Ill., 96; *Knox vs. Clifford*, 38 Wis., 651; *Allum vs. Perry*, 68 Me., 232; *Creque vs. Sears*, 17 Hun (N. Y.), 123.

The court further instructs you, that when a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief so as to change his previous condition, the person inducing such belief will be estopped from afterwards denying the existence of such state of things, to the prejudice of the person so acting. *People vs. Brown*, 67 Ill., 435; *Redman vs. Graham*, 80 N. C., 231; *Reedy vs. Brunner*, 60 Ga., 107; *Harden vs. Joice*, 2 Kas., 318; *Winterink vs. Maynard*, 47 Ia., 366.

That any statement or admission by one person, intended to influence the conduct of another, if acted upon by the latter, will be binding upon the former; and it is a matter of no importance whether such representations are made in direct language to the plaintiff himself, or whether they may be implied from the conduct of the party sought to be charged; provided, such conduct was intended to influence the actions of the other, and did so influence it, to the latter's prejudice.

§ 2. **Intention not Essential.**—The jury are instructed, that to constitute an estoppel, it is not necessary that the party should design to mislead; it is enough if the act of declaration was calculated to, and did, in fact, mislead another to his injury, while acting in good faith and with reasonable diligence. *Blair vs. Wait*, 69 N. Y., 113; *Mayer vs. Erhardt*, 88 Ill., 452.

§ 3. **Knowingly Permitting Another to Deal with Property as Owner.**—That if the true owner of property stands by and knowingly suffers another to sell his property, under a claim of ownership, and does not give notice of his title to the party purchasing, he will be estopped from afterwards setting up his title to the property. *Colwell vs. Brower*, 75 Ill., 516; *Carroll vs. Turner*, 54 Ga., 177.

The jury are instructed, that whenever the circumstances are such as to show that the true owner of property knows that another claims to own his property, and is selling or incumbering it to an innocent party, and he fails to give notice of his title, the law will regard the silence of the true owner as a fraud upon the innocent party, and he will be estopped from afterwards setting up his title to defeat such innocent party. *Sebright vs. Moore*, 33 Mich., 92; *Sweeny vs. Mallory*, 62 Mo., 485.

In this case, although you may believe, from the evidence, that plaintiff was, in fact, the owner of the property in question, yet, if you further believe, from the evidence, that he voluntarily and knowingly permitted and allowed A. E. to have the possession of the property, and to exercise such acts of ownership over it, and to so use, manage and control the property as to authorize and justify an ordinarily prudent man in supposing that A. E. was, in fact, the owner of the property; and if you further believe, from the evidence, that the defendant, in good faith, bought the property in question from the said A. E., supposing and believing that he was the owner thereof, then the plaintiff is estopped from now setting up a claim to the property on the ground that the said A. E. was not such owner.

If you believe, from the evidence, that before the making of the mortgage in question, the defendant represented to the

plaintiff that A. B., the mortgagor, was the owner of the horse in question, and that the plaintiff believed such representations, and, relying upon the truth thereof, loaned A. B. money, and in good faith took the mortgage to secure said loan, then it is wholly immaterial whether A. B. was really the owner of the horse or not, as against the defendant, for the reason that he is now estopped from denying such ownership as against the plaintiff.

§ 4. **Representations by the Acts of a Party.**—That if a person knowingly and voluntarily so conducts himself in relation to his business, as to justify persons dealing with him in supposing and believing that a certain state of facts exist, and such persons do deal with him, relying on that inference and belief, the person so conducting himself will not afterwards be permitted to deny that such state of facts did exist, to the prejudice of persons acting upon such belief.

If a married woman is in the possession of property, claiming to own and control the same, and on her declaration of ownership employs a party to make improvements on the same, under the belief that it is her separate property, she will be estopped from denying that she owned it, when sued for the value of the labor performed. *Nixon vs. Halley*, 78 Ill., 611.

§ 5. **Representation Must be Acted on.**—Before a party can be estopped from denying the truth of any statement or admission formerly made by him, the jury must believe, from the evidence, that such statements or admissions have induced the other party to act differently from what he otherwise would have done, had not such statements or admissions been made, and that to permit such denial would now prejudice the rights of such party to his injury. 1 Greenl. Ev., § 209; *Henry vs. Heeb*, 16 N. E. Rep., 606.

§ 6. **Must be a Fraudulent Purpose or Result.**—The jury are instructed that, to conclude a party by an estoppel, there must be a fraudulent purpose on the part of the party against whom it is to be applied, or his acts must produce a fraudulent result; there must be a change of conduct induced by the acts of the party estopped, to the injury of another, in order to prevent him from showing the truth.

The doctrine of estoppel is based upon a fraudulent purpose and a fraudulent result, and if the element of fraud is wanting there is no estoppel. *Chandler vs. White*, 84 Ill., 435.

That the doctrine of equitable estoppels is based upon a fraudulent purpose and a fraudulent result; if, therefore, the element of fraud is wanting, there is no estoppel; if both parties were equally cognizant of all the facts and the declaration, or silence of one party produced no change in the conduct of the other, then there is no estoppel. *Dorlarque vs. Cress*, 71 Ill., 380.

§ 7. **Injury Must Be Shown.**—That a person is under no legal obligation to tell the truth, at all times, regarding his own business or property; and although the jury may believe, from the evidence, that the plaintiff told the defendant at one time (*that the said horse belonged to A. B.*), still, if the jury believe, from all the evidence in the case, that that statement was untrue, or contrary to the fact, then the plaintiff will not be bound by such statement, unless the jury further believe, from the evidence, that the defendant, believing the statement to be true, has acted upon it and changed his condition, so that now he will be injured, or in some manner prejudiced, by permitting the truth to prevail.

CHAPTER XIX.

FORCIBLE ENTRY AND DETAINER.

- SEC. 1. Title not involved.
2. Entry by force not necessary.
3. Entry by force or threats essential.
4. The real question in issue.
5. Possession by tenant.
6. What constitutes possession.
7. Possession when actual and real.
8. What not possession.
9. Burden of proof.

NOTE.—The following instructions are believed to present the general rules of law pertaining to this action; but these laws differ in the different states.

§ 1. **Title not Involved.**—The court instructs the jury, that in this action the title to the property in question is not involved; the material questions in the case for the jury to determine are the right to the possession of the premises. *Myers vs. Koenig*, 5 Neb., 419.

You are instructed, that the law requires a person who claims title and the right to the possession of premises in the actual, peaceable possession of another, to resort to his legal remedies instead of taking the law into his own hands, and gaining such possession by force, or by invading the actual, peaceable possession of another.

That although you may believe, from the evidence, that the defendant was the legal owner of the premises in question, and was lawfully entitled to the possession thereof, still, if you further believe, from the evidence, that plaintiff was in the actual, exclusive and peaceable possession of the premises, the defendant would have no right to forcibly enter and expel the plaintiff therefrom. *Cooley on Torts*, 323; *Dilworth vs. Fee*, 52 Mo., 130; *Huftalin vs. Misner*, 70 Ill., 205.

You are instructed, as a matter of law, that in this state the

owner in fee of lands is not permitted to enter upon the possession of the same while they are in the actual and peaceable occupation of another, against the will of the latter, and if he does so, the law will require him to restore the possession to such occupier.

§ 2. **Entry by Force not Necessary.**—The court instructs the jury, that it is not necessary, in order to constitute a forcible entry, that actual force or violence should be used; any entry upon the possession of another, without his consent and against his will, is a forcible entry, within the meaning of the law.

If you believe, from the evidence, that the plaintiff was in the actual and peaceable possession of the premises in question, on, etc., and that on that day the defendant intruded into and took possession of said premises, against the will and without the consent of the plaintiff; and if you further believe, from the evidence, that the plaintiff, before the commencement of this suit, made a written demand upon the defendant to surrender the possession of said premises (*or according to the requirements of the statute*), and that the defendant refused to comply with such demand, then you will find a verdict for the plaintiff.

If you believe, from the evidence, that the plaintiff was in the peaceable possession of the premises sued for, and that while he was so in possession, the defendant, at the time alleged, entered upon such possession, without the consent and against the will of the plaintiff, and still holds such possession; and if you further believe, from the evidence, that before the commencement of this suit, the plaintiff made a written demand upon the defendant for the possession of said premises (*or following the requirements of the statute*), then you should find a verdict for the plaintiff. *Croff vs. Balinger*, 18 Ill., 200; *McCartney vs. Auer*, 50 Mo., 395.

§ 3. **Entry by Force or Threats Essential.**—The jury are instructed that to authorize a verdict against the defendant, the jury must believe from the evidence that the plaintiff was in the actual possession of the premises prior to the alleged forcible entry or detention, and that the defendant

took the possession with force and violence, or by such a show of force and threats as was reasonably calculated to intimidate the plaintiff, or else that the defendant kept such possession unlawfully and by force and violence, or by threatening the same. *Archey vs. Knight*, 61 Ind., 311.

The offenses of forcible entry and forcible detainer are entirely distinct. Every forcible entry is forbidden by law, and is, therefore, unlawful, whether the person taking such forcible possession is legally entitled to the possession or not. But every forcible detainer is not forbidden by law; if a person gains peaceable possession and he is then legally entitled to possession, he may hold such possession by force. *Hoffman vs. Harrington*, 22 Mich., 52.

The law is that if a person obtains an entry upon the possession of another by stealth or stratagem, or in any other way without actual force or violence, and the jury believe, from the evidence, that such entry was for the purpose and with the intention of forcibly expelling the person in possession, and the entry is followed up by an actual expulsion of such person by means of personal threats or violence or superior force, it will amount to forcible entry. *Seitz vs. Miles*, 16 Mich., 456; *People vs. Smith*, 24 Barb. (S. C.), 16.

You are instructed that if you believe, from the evidence, that some time on and about, etc., the premises in question were vacant and unoccupied, and that the plaintiff then made a peaceable entry into said premises under a *bona fide* claim of right, and inclosed the same (with a wire fence), then this was an actual possession by him. And if you further believe, from the evidence, that after the plaintiff had so taken possession, the defendant, in plaintiff's absence, took possession of said premises and forcibly tore down the said fence and refused to surrender possession to the plaintiff upon his demand, this would amount to a forcible entry and detainer and you should find the defendant guilty. *Campbell vs. Coonradt*, 22 Kans., 704.

§ 4. The Real Question in Issue.—The jury are instructed that whether the plaintiff was lawfully or unlawfully in the possession of the premises, is a matter of no consequence in this suit. The material questions for the jury to determine by

the evidence, are whether, in fact, at the time in question, the plaintiff was in the actual, peaceable possession of the premises in question, and whether the defendant entered upon such possession against the will of the plaintiff, and retains such possession; and if the jury find both these points in favor of the plaintiff (*and that he served a written demand for such possession upon the defendant before the commencement of this suit*), then the jury should find the defendant guilty. *Allen vs. Tobias*, 77 Ill., 169; *Jones vs. Shay*, 50 Cal., 508.

If you believe, from the evidence, that prior and up to about the — day of, etc., the plaintiff was in the actual and peaceable possession of the premises in question, either by himself or his agent, and that while the plaintiff was so in possession, the defendant intruded himself into such possession without the consent of the plaintiff, such intrusion would be unlawful, and will render the defendant liable in this action; provided, you further believe, from the evidence, that (*a written demand was made upon him for the possession of said premises*) before the commencement of this suit, and that he refused to surrender such possession.

§ 5. **Possession by Tenant.**—If the jury believe, from the evidence, that prior and up to about the — day of, etc., the plaintiff was in the actual, peaceable possession of the premises in question, by A. B., his tenant, and that, on or about that time, the said A. B., moved out without the knowledge of the plaintiff, and left the premises temporarily unoccupied, these facts would not authorize the defendant to enter upon said premises and take the possession thereof without the consent of the plaintiff; and if the jury further believe, from the evidence, that the defendant did so take possession, then the plaintiff would be entitled to a verdict (*provided, the evidence shows that the plaintiff caused a written demand for such possession to be made on the defendant before commencing this suit, and that the defendant refused to surrender such possession*).

If you believe, from the evidence, that prior and up to about the — day of, etc., the said plaintiff was in the actual peaceable possession of said premises by one A. B., his tenant, and that at or about that time the said tenant and the defend-

ant, for the purpose of depriving the plaintiff of such possession, entered into a collusive agreement or arrangement, by which the said A. B. was to move out of said premises, and the said defendant was to immediately move in, and that this collusive arrangement was carried out, and the defendant thereby acquired the possession of such premises, such possession would be unlawful, and render the defendant liable to be removed therefrom in an action of forcible entry and detainer (provided, a written demand was made by the plaintiff upon the defendant for such possession before commencing the suit, and that he refused to surrender such possession).

§ 6. **What Constitutes Possession.**—The jury are instructed, that it is not necessary, in order to establish possession of real estate, that the claimant should actually reside upon it or have it inclosed with a fence. It is enough if the party is doing such acts thereon as indicate in an open, public, visible manner, that he is exercising exclusive control over the land under a claim of right to such exclusive possession. *Pearson vs. Herr*, 53 Ill., 145.

The court instructs you, as a matter of law, that in order to constitute possession of real estate, it is not necessary that the lands shall be resided upon or surrounded by a fence. Any act that will equally well evince an intention to assert and claim possession, such as raising crops, cutting grass, or herding cattle thereon—provided such herding is open and exclusive—will constitute such a possession as will enable the party to maintain an action of forcible entry and detainer against any person who, without the consent of the party so in possession, enters upon such possession and wrongfully and forcibly holds the same. *Goodrich vs. Van Landingham*, 46 Cal., 601; *Bradley vs. West*, 60 Mo., 59; *Pensoneau vs. Bertke*, 82 Ill., 161.

§ 7. **Possession—When Actual and Real.**—That when an actual possession is relied upon, in this form of action, it must be open, public and exclusive, or it will not be sufficient; and in this case, if the jury believe, from the evidence, that the acts which are relied upon by the plaintiff to indicate possession, are of such a character that they may as well indicate acts of

trespass as an assertion of ownership or right to possession, then they are not sufficient to sustain this action.

If you believe, from the evidence, that at the time of the alleged entry by defendant, the lands in question were uninclosed and uncultivated, and were used in common by the neighborhood generally, and that the plaintiff only used them as the other inhabitants did, then these acts alone would not indicate such a possession as is required to maintain this action.

§ 8. **What Not Possession.**—If the jury believe, from the evidence, that the acts from which plaintiff claims to have had possession of the premises were not of such a character as to arrest the attention of those in the vicinity, or to indicate to them that he claimed exclusive possession, but were such as would in reality indicate to the neighbors that his entries upon the land were only casual, and not under any claim of right to the exclusive possession thereof, then the defendant did not have such a possession as would sustain this action.

If you believe, from the evidence, that the lands in question, at the time of the alleged entry by defendant, were uninclosed and uncultivated, and that plaintiff's cattle were only pastured upon the said lands occasionally, with other cattle in that vicinity, feeding there and on adjoining lands, and that plaintiff only occasionally took some trees from the land, such acts would not be sufficient to show the possession required to maintain this action.

If you believe, from the evidence, that shortly before the alleged entry upon said premises by the defendant, and before any entry thereon by the plaintiff, the defendant had been in possession of the said house, and that when he left he locked the doors, taking with him the key to the outside door, and that he retained possession of said key; and if you further believe, from the evidence, that some time about the, etc., and while the defendant had said key in his possession, or under his control, the plaintiff effected an entrance to said house through one of the windows, without the knowledge or consent of the defendant, then a possession thus acquired by the plaintiff is not sufficient to sustain this action. *Cooley on Torts*, 322, 323; *Szeinlein v. Halstead*, 42 Wis., 422; *Wray vs. Taylor*, 56 Ala., 188.

§ 9. **Burden of Proof.**—The court instructs the jury, that in this case the burden of proof is upon the plaintiff, and to sustain his action he must prove, by a preponderance of the evidence, that he was in the actual, open and exclusive possession of the premises at the time of the alleged entry by defendant, and that he, while the plaintiff was so in possession, intruded himself into said possession against the consent of the plaintiff. And if the jury believe, from the evidence, that the plaintiff was not in the actual exclusive possession of the premises at the time of the alleged entry of the defendant, the jury should find the issues for the defendant.

CHAPTER XX.

STATUTE OF FRAUDS.

- SEC. 1. What is a promise to pay the debt of another.
2. What is not a promise to pay the debt of another.
3. Contract not to be performed within a year.

§ 1. **What is the Promise to Pay the Debt of Another.**—The jury are instructed that in order to hold a person liable on a verbal promise to pay for goods furnished to another, the goods must be furnished exclusively upon the credit of such promiser, and the creditor must have discharged the receipt out of the goods at the time of the sale from all liability therefor—he can not retain an option to claim payment from one or the other at his future election—and in this case, if the jury believe, from the evidence, that the plaintiff sold the goods to one F. and charged them to him upon the promise that if F. did not pay for the goods then the defendant would pay for them, such a promise on the part of the defendant would be within the statute of frauds and would not be binding unless it were in writing. *Welch vs. Marvin*, 36 Mich., 59.

If the jury believe, from the evidence, that some time about, etc., one F. applied to the plaintiff and desired to purchase from him, etc., on credit, and that plaintiff refused to extend such credit without some kind of security or assurance that the debt would be paid, and that thereupon the defendant told plaintiff to let F. have the goods and that if F. did not pay for them he would, then such a promise would be within the statute of frauds, and the defendant would not be liable thereon.

Welch vs. Marvin, 36 Mich., 59; *Cole vs. Hutchinson*, 26 N. W. Rep., 319; *Brown vs. Bradshaw*, 1 Duer, 199.

§ 2. **What is not a Promise to Pay the Debt of Another.**—If the jury believe, from the evidence, that some time on or about, etc., one A. was indebted to the plaintiff in the sum of \$—— and that at or about that time the defendant purchased from A. a certain, etc., and as a part of the contract of purchase, agreed to pay to the plaintiff \$—— of the purchase price

of said property to apply on the debt so due from A. to the plaintiff, then the defendant's promise would not be within the statute of frauds as a promise to pay the debt of another, and the plaintiff is entitled to recover upon such promise in this case. *Lee vs. Newman*, 55 Miss., 365; 5 Greenlf. (Me.), 81; 9 Cowan, 266; *Williams vs. Rogers*, 14 Bush. (Ky.), 776; *Beardslee vs. Morgner*, 4 Mo. App., 139.

If the jury believe, from the evidence, that the defendant entered into a contract with one F., by which it was agreed that F. should build a house for defendant and furnish the material therefor, and that thereupon the defendant promised plaintiff that if he would furnish F. the material for said house he would see plaintiff paid out of the money coming to F. under his contract, and that, relying upon that promise of defendant, plaintiff let F. have the material charged in the account sued on in this case, and that without such promise the plaintiff would not have furnished the material, then the defendant's promise is not within the statute of frauds, and he is liable thereon. *Eustabrook vs. Gebhart*, 32 Ohio St., 415; *Calkins vs. Chandler*, 36 Mich., 320.

If the jury believe, from the evidence, that some time about, etc., the defendant entered into a contract with one F., whereby F. agreed to erect for the defendant a dwelling house and furnish the material therefor, and that afterwards F. made a contract with the plaintiff by which the plaintiff agreed to furnish certain materials, consisting of, etc., to be used in the constructing of said house, and that the plaintiff did afterwards, in pursuance of said last mentioned contract, furnish a portion of said materials, and then refuse to furnish any more until he could be assured of his pay for the same, and that then the plaintiff and F. called on defendant in reference thereto, and the defendant, in the conversation referring to the said materials and the said buildings, said to the plaintiff, I will pay for all the material which you put into that building, and that plaintiff, relying on that promise, afterwards furnished material which went into that building, then such promise of the defendant would not be within the statute of frauds, and he would be liable thereon for the material so furnished. *Hartley vs. Varner*, 98 Ill., 591; *Morrison vs. Baker*, 81 N. C., 76; *Thatcher vs. Rockwell*, 4 Col., 375.

Although the jury may believe, from the evidence, that the whole of the material for the price of which this suit is brought, was charged on the account books of the plaintiff to the said F., still if the jury further believe, from the evidence, that before the stuff was furnished, the defendant promised to pay for the same if it should be furnished to F., and that the material was, in fact, furnished to F. upon the promise of the defendant to pay for the same and not upon the account, credit or promise of the said F., then the said plaintiff is entitled to recover in this suit for the value of the material so furnished.

§ 3. **Contract not to be Performed within a Year.**—The law is that where a contract is not to be fully performed within one year from the time it is made, it is not binding upon either of the parties, but if work has been done or services performed by one of the parties for the other, with his knowledge and consent, under such a contract, the person performing the service or doing the work may recover therefor what the same is reasonably worth. *Towsley vs. Moore*, 30 Ohio St., 184; *Brown on Frauds*, Sec. 117; 3 Pars. on Cont., 38; *Frary vs. Sterling*, 99 Mass., 461; *Patton vs. Hicks*, 44 Cal., 509; *Moore vs. Aldrich*, 25 Texas, 276; *Wm. Butcher Steel Works vs. Atkinson*, 68 Ill., 421.

The jury are instructed, that under the laws of this state, an agreement that is merely verbal and not in writing, and which by its terms is not to be fully performed within one year from the making thereof, is not valid nor binding on the parties; and though the jury may believe, from the evidence, that there was an agreement between the parties by which the defendant agreed to employ the plaintiff for a period of two years, at a salary of twenty-five hundred dollars for the first year and at an increased salary for the second year, still if the jury further find, from the evidence, that such contract was not reduced to writing, nor any note or memorandum thereof made and signed by the defendant or its authorized agent, then such contract would not be binding on the defendant for a longer time than one year from the time the same was made, and the defendant would have the right to discharge the plaintiff at any time after the expiration of the first year, and would only be liable to pay him at the contract price for the services actually rendered. *Brown on the Statute of Frauds*, § 118; *Shute vs. Dorr*, 5 Wend., 204.

CHAPTER XXI.

FRAUDS AGAINST CREDITORS.

- Sec. 1. Sale with intent to defraud creditors.
2. Fraudulent, though with a good consideration, when.
3. Must be a change of possession—Fraud *per se*.
4. Must be outward, visible signs of change of possession.
5. Priority of possession under execution.
6. Retaining possession—Presumptive evidence of fraud.
7. Good faith a question for the jury, when.
8. Possession evidence of ownership.
9. Possession not evidence of ownership, when.
10. Only such change required as can reasonably be made.
11. Property in possession of a third party.
12. Symbolical delivery.
13. Possession by agent.
14. Possession of growing crops.
15. Temporary possession of vendee.
16. Person in debt may sell his property.
17. Sale by relatives not necessarily fraudulent.
18. Debtor may transfer property in payment of debts.
19. Sale on credit.
20. Debtor may prefer creditor.
21. Preferring wife as creditor.
22. Purchaser may be chargeable with notice of fraud.
23. Creditor not affected by knowledge, when.
24. What is sufficient notice of fraudulent intent.
25. Honest intent presumed.

CHATTEL MORTGAGE AS AGAINST JUDGMENT CREDITORS.

26. Good between the parties without recording.
27. As to creditors, must be acknowledged and recorded.
28. Mortgagee must see to statutory requirements.
29. Acknowledgment and recording, how proved.
30. Mortgagee must take possession of the property, when.
31. Fraudulent mortgage void.
32. Note for more than amount due.
33. Mortgage of stock of goods.
34. Both parties must intend the fraud.
35. Good faith, how proven.
36. Intent to defraud must exist at the time of, etc.
37. Subsequent acts will not render void.

38. Sale by mortgagor.
39. Mortgage to secure further advances.
40. Possession by the mortgagee.
41. Possession by the mortgagor after default.
42. Mortgage to secure contingent liability.
43. Taking possession before debt due.
44. Sale by mortgagor for benefit of mortgagee.

NOTE.—In many of the states, the retaining of the possession of personal property, by the vendor, after an absolute sale, is held, in favor of the creditors of the vendor, to be *prima facie* or presumptive evidence of a fraudulent intent on the part of the vendor, known to and participated in by the vendee; but such presumption may be rebutted by evidence of good faith. In some of the states such retaining of possession is held to be conclusive evidence of fraud, in favor of the creditors of the vendor, and not subject to explanation. In other states the matter is regulated by statute. Bump on Fraud. Conv., 60, and the cases there cited.

§ 1. **Sale with Intent to Defraud Creditors.**—The jury are instructed, that every sale or conveyance of property, made by the parties with intent to hinder, delay or defraud creditors in the collection of their debts, is fraudulent and void as to such creditors, whether such sale or assignment is made with or without a valuable consideration therefor. *Campbell v. Whitson*, 68 Ill., 240.

§ 2. **Fraudulent, Though for a Good Consideration, When.**—That a conveyance or sale of property made with the intent, on the part of the vendor, to delay, hinder or defraud a particular creditor in the collection of his debt, is void as against all the creditors of the vendor, if the intent be known to or participated in by the vendee, although made for a good and valuable consideration. Bump on Fraud. Conv., 198; *Nelson vs. Smith*, 28 Ill., 495; *Chappell vs. Clapp*, 29 Ia., 191; *Harrison vs. Jaquess*, 29 Ind., 208; *Castro vs. Illies*, 22 Texas, 479; *Gardiner vs. Otis*, 13 Wis., 460.

You are instructed, that if a purchaser knows that the vendor has a fraudulent purpose in making the sale, and buys with that knowledge, he is not a *bona fide* purchaser.

§ 3. **Must be a Change of Possession—Fraud per se.**—The court instructs the jury, as a matter of law, that any sale or conveyance of personal property, to be valid, as against the creditors of the seller, must be accompanied and followed by

a change in the possession of such property, from the seller to the purchaser, so far as the situation of the parties and the character of the property will reasonably admit of a change of possession.

That the change of the possession of personal property upon a sale thereof, must not be merely nominal or momentary; it must be real, actual and open, and such as may be publicly known, so far as the circumstances will reasonably admit of. A continued possession by the vendor of personal property, as ostensible owner, after an absolute sale, renders the sale fraudulent and void, as against creditors of the vendor. *Wright vs. Grover*, 27 Ill., 426; *Sutton vs. Ballou*, 46 Iowa, 517; *Cater vs. Collins*, 2 Mo. App., 225; *Bosse vs. Thomas*, 3 Ill. App., 472.

That any sale of personal property, when it is permitted to remain with the vendor, if it is of that character of property that it is capable of being removed, or of having a change in the possession of it made, is fraudulent in law, as to creditors and subsequent purchasers, notwithstanding the sale may be in good faith, and for a valuable consideration. *Ticknor vs. McClelland*, 84 Ill., 471.

§ 4. **Must be Outward, Visible Signs of Change of Possession.**—The jury are instructed, that when persons are doing business as a firm, and, in the way of their business, have in their possession a stock of goods in store, and while they are so doing business, they contract debts, then no sale or assignment of such stock of goods, or any interest therein, will be valid, as against the creditors of the firm, unless the creditors have actual notice of the sale, or there is such a change in the possession of the goods, and of the outward and visible signs of ownership, as would indicate to the public, and to those dealing with the stock, that such sale or transfer had been made. *Wright vs. McCormick*, 67 Mo., 426.

If you believe, from the evidence, that some time about the month of ——— J. and B. commenced to do business as partners, and, in the way of their business, had a stock of goods at ———, and that while they were so doing business, that firm became indebted to K. upon the note introduced in evidence, and that afterwards J. sold out all his interest in the stock of

goods to his partner, such a sale would, in law, be fraudulent and void as against K., unless you believe, from the evidence, that K. had actual notice of the sale, or unless the sale was accompanied and followed by all such changes in the possession of the stock of goods, and in the manner of doing business in connection therewith, as would, so far as the circumstances would reasonably admit of, notify the public and persons dealing with the firm, and with the stock of goods, that such sale had been made.

You are instructed, as a matter of law, that any sale or assignment of personal property, when the possession of the property is permitted by the purchaser to remain in the seller, is fraudulent and void as against the creditors of the seller; and where the nature of the property and the situation of the parties will admit of it, in order to constitute a change of possession, there must be some outward, open, visible change in the relation of the parties to the goods, indicating a change in the possession that could be seen and known by persons dealing with the goods. *Pickard vs. Hopkins*, 17 Ill. App., 570.

If you believe, from the evidence, that before and up to the time of the alleged sale from A. B. to the plaintiff, A. B. had been engaged in business as a retail merchant, and that the goods in question, or any of them, were a part of his stock in trade, and after the alleged sale A. B. and his former clerk remained in charge of the store, and that nothing was done by the parties to notify the public that there had been a sale, then the sale would, in law, be fraudulent and void as against the creditors of A. B.; and if you further believe that A. B. was indebted to the said K., before and at the time of the alleged sale, then the property, while so remaining in the possession of A. B., could lawfully be taken on an attachment writ or execution, issued in favor of the said K., and against the said A. B.

That when a person engaged in business as a retail merchant, sells out his business and entire stock in trade to another, in order to render the sale valid as against the creditors of the seller, it is necessary that there be an actual change of the possession of the property sold, from the former owner to the purchaser, attended by such outward and visible signs of a change of possession as could be seen and known to the public, or to persons dealing with the goods.

The court instructs you, that while a sale of property may be good, as between the vendor and vendee, without actual delivery, yet to make such sale valid and binding, as against the creditors of the vendor, there must be a delivery of the property so sold; and such delivery must be an actual, manual delivery, when the property is susceptible of it; and when the property is so heavy or bulky that manual delivery is impracticable, then there must be some outward public act done by way of delivering the possession, which shows an intention by the parties to change the possession from the seller to the buyer, so far as it can reasonably be done under the circumstances of the case. *Ticknor vs. McClelland*, 84 Ill., 471; *Allen vs. Carr*, 85 Ill., 388.

§ 5. **Priority of Possession under Execution.**—If the jury believe, from the evidence, that at the time of the alleged purchase of the property, there was no act done by the seller towards turning over the property to the plaintiff, and no act done by the plaintiff towards taking possession of the property, then, as against the execution creditors of the seller, such a sale would be fraudulent and void in law, and the execution introduced in evidence, if received by the officer (*or levied upon the property*) before any acts were done towards changing the possession of it, would hold the property as against the plaintiff.

§ 6. **Retaining Possession—Presumptive Evidence of Fraud.**—The court instructs the jury, that the law presumes every sale of personal property to be fraudulent and void, as against the creditors of the seller, unless a change of possession of the property, from the seller to the purchaser, accompanies and follows the sale; and this change must be an open, visible change, manifested by such outward signs as render it evident to persons dealing with the property, that the possession of the former owner, as such, has ceased. *Osborne vs. Ratcliffe*, 53 Ia., 748.

In this case, although you may believe, from the evidence, that the plaintiff and the said A. B., before the execution, introduced in evidence in this case, was issued and received by the officer (*or levied upon the property*); went through with

the forms of a sale from the latter to the former; still, if you further believe, from the evidence, that there was no apparent change in the possession of the property accompanying such sale, then the law presumes the sale to have been made with a fraudulent intent on the part of the seller, known to and participated in by the plaintiff, and, in such case, the burden of proof is on the plaintiff to show the good faith of the transaction, by a preponderance of evidence.

You are further instructed, as a matter of law, that where a sale of personal property is alleged to have been made, and there is no change in the possession of the property accompanying or following the sale, then the law presumes that such sale was made with intent to hinder, delay or defraud the creditors of the seller; and to render such a sale valid and binding, as against such creditors, the burden of proof is on the purchaser to show, by a preponderance of evidence, that the sale was *bona fide* and honest, and not designed as a mere trick to cover up the property. *Webster vs. Anderson*, 42 Mich., 554; *Stern vs. Henley*, 68 Mo., 262; *Geisendorff vs. Eagles*, 70 Ind., 418.

§ 7. **Good Faith a Question for the Jury, When.**—The jury are instructed, that although the law presumes every sale of personal property, where the possession of the property is allowed to remain with the seller, to be fraudulent and void, as against the creditors of the seller, still, this presumption of law is not conclusive on the parties, and whether the sale was, in fact, made in good faith, is a question to be determined by the jury, from a consideration of all the evidence in the case.

And in this case, if you believe, from all the facts and circumstances attending the sale in question, as shown by the evidence, that the sale was *bona fide*, and for a valuable consideration, and not made with intent, or for the purpose of hindering, delaying or defrauding the creditors of the said A. B., then such a sale is as valid and binding as though the possession of the property had passed to the plaintiff at the time of the sale. *Crawford vs. Kirksey*, 55 Ala., 282; *Robinson vs. Uhl*, 6 Neb., 328; *Morgan vs. Bogue*, 7 Neb., 429; *McCully vs. Swackhamer*, 6 Oreg., 438.

§ 8. **Possession Evidence of Ownership.**—The court instructs

the jury, that possession of personal property is *prima facie* evidence of ownership, if there are no circumstances accompanying the possession to rebut the presumption of ownership; and if the jury believe, from the evidence, that the plaintiff had been in possession of the property in question for — months, prior and up to the time it was taken, and under circumstances indicating ownership in him, then it is incumbent upon the defendant to show, by a preponderance of testimony, that the title was not in the plaintiff, and unless he has done so, they should find for the plaintiff, as to the ownership of the property. *Bergen vs. Riggs*, 34 Ill., 170.

§ 9. **Possession not Evidence of Ownership, When.**—The jury are instructed, that although it is a general rule of law, that possession of personal property is *prima facie* evidence of title in the person in possession, still the possession may be accompanied by such circumstances as to rebut such presumption; and so in this case, although the jury may believe, from the evidence, that the defendant was in possession of the property when, etc., still, if the jury further find, from the evidence, that such possession was attended or accompanied by such circumstances as rebut the presumption of ownership arising from such possession, then such possession is not, of itself alone, even *prima facie* evidence of ownership in the defendant.

§ 10. **Only Such Change Required as can Reasonably be Made.**—In determining what it takes to constitute a delivery and change of possession of personal property upon a sale of it, the jury should take into consideration the character of the property, and the situation of the parties at the time of the sale; and in this case, if the jury find, from the evidence, that the plaintiff purchased the property in question in good faith, and for a valuable consideration, before the execution, introduced in evidence, came into the hands of the officer (*or was levied upon the property*), that plaintiff had done everything which could reasonably be done, under the circumstances, by way of taking possession of the property, under the sale to him, then the property would not be liable to be taken on the execution. *Bump on Fraud. Conv.*, 165; *Cartright vs. Phoenix*, 7 Cal., 281; *Allen vs. Smith*, 10 Mass., 308; *Chase vs. Ralston*, 30 Penn. St., 539.

That the rule of law requiring a change of possession of personal property upon the sale of it, in order that the sale shall not be fraudulent as against creditors, only requires such a change of possession as the articles sold will conveniently and reasonably admit of, and in the case of heavy and cumbersome articles, an actual delivery of any essential part thereof, with the intention of delivering the whole, is, in law, equivalent to a delivery of the whole article sold. 1 Pars. on Cont., 443.

The court instructs you, that although a delivery of personal property sold is necessary to pass the title thereto, as against the creditors of the seller, yet such delivery need not necessarily be an actual delivery; but anything which clearly shows a surrender of ownership by the seller, and an assumption of ownership by the purchaser, accompanied by such circumstances as would reasonably advise the world of such change of ownership, is all that is necessary on that point. *Pickard vs. Hopkins*, 17 Ill. App., 570.

§ 11. **Property in Possession of Third Person.**—The court instructs the jury, that where personal property is sold, which, at the time of the sale, is in the actual possession or under the control of a third person, no other delivery of such property is necessary, than that the seller and purchaser, together with such third person, should agree that such third person should thereafter keep possession of the property for the purchaser, and he does so keep possession. *Ibid.*

§ 12. **Symbolical Delivery.**—The jury are instructed, that the transfer of a bill of lading, on a sale or pledge of the property shipped, is a symbolical delivery of the property to the purchaser or pledgee, and, if proved, is a good delivery of the property as against the creditors of the shippers. 1 Pars. on Cont., 443; *Mich. Cent. Rd. Co. vs. Phillips*, 60 Ill., 190.

§ 13. **Possession by Agent.**—That a party may be in possession of personal property, by his agent as well as by himself, and if the goods are sold in good faith, and for a valuable consideration, and the possession is delivered to the purchaser, it is not necessary that he should remain in the actual possession of the property to guard his title; but such possession may be by an agent, and such agent may be the seller of the

property, if the possession is such as reasonably to advise the creditors of the change in the title of the property. *Warner vs. Carleton*, 22 Ill., 415.

§ 14. **Possession of Growing Crops.**—The court instructs the jury, that upon the sale of personal property, where the goods are purchased, and are incapable of being handed over from one to another, there need not be a manual delivery; and in the case of the sale of standing crops, the possession will be in the vendee until it is time to harvest them, and until then he is not required to take manual or actual possession of them. *Ticknor vs. McClelland*, 84 Ill., 471.

§ 15. **Temporary Possession of Vendee.**—If the jury believe, from the evidence, that the plaintiff purchased the property in good faith, and paid a valuable consideration therefor, and then took actual possession of the property under such sale, and continued such possession long enough and under such circumstances as to apprise the public generally of a change in the ownership of the property, then, although the jury should find, from the evidence, that the plaintiff loaned the property temporarily to the said A. B., this would not alone render the sale fraudulent or void (*or not presumptive evidence of a fraudulent sale, etc.*), as against the creditors of the said A. B. *Cunningham vs. Hamilton*, 25 Ill., 228.

§ 16. **A Person Indebted may Sell his Property.**—That a party, though in debt, may sell his property to any one he pleases, if for an honest and fair consideration, and no lien exists to forbid it. If the transaction be an honest one, made in good faith and for an adequate consideration, it matters not how many creditors may be prevented thereby from reaching the property.

The jury are instructed, that although a sale of a debtor's property may have the effect to hinder and delay his creditors in the collection of their debts, this fact alone will not render the sale fraudulent or void; a debtor, however insolvent, may lawfully sell his property, even for less than its worth, if it is done with a *bona fide* intention of applying the proceeds in discharge of any legal liability. *Bump on Fraud. Conv.*, 44; *Nelson vs. Smith*, 28 Ill., 495.

You are instructed, that a sale of property in good faith, for a valuable consideration, when there is a delivery of the property sold, passes the title to the purchaser, and the fact that the seller was in debt will not, of itself, invalidate the sale, although the purchaser may have known that fact at the time of the purchase.

If you believe, from the evidence, that C. was indebted to third persons at the time of the sale to the plaintiff, if such sale has been proved, and that the plaintiff agreed to pay such debts, this would constitute a good consideration for the sale to the plaintiff, if the sale was made in good faith. *Warner vs. Carleton*, 22 Ill., 415.

§ 17. **Sale to Relatives not Necessarily Fraudulent.**—A man has a perfect right to deal with his friends and relations,—to buy or sell from or to them, and the presumption of law is, that the dealings between relatives are fair and honest, without any fraudulent intent, and no presumption of fraud attaches to such dealings; and if a man finds himself in failing circumstances he has a right to prefer one creditor to another,—to so dispose of his property that one of his creditors shall receive his pay in full and others receive nothing. Nor there is any presumption of fraud in so doing. *Schroeder vs. Walsh*, 120 Ill., 410; *Wightman vs. Hart*, 37 Ill., 123; *Waterman vs. Donaldson*, 43 Ill., 29; *Bump on Fraudulent Conveyances*, 56.

§ 18. **Debtor may Transfer Property in Payment of Debts.**—The jury are instructed, that a person who is indebted and unable to pay all his debts in full, has a right to prefer any one, or more, of his creditors to the exclusion of all the others; and in the payment of a *bona fide* indebtedness to one of his creditors, a debtor may exhaust the whole of his property, so as to leave nothing for the other creditors, who are equally meritorious. *Bump on Fraud. Conv.*, 183; *State vs. Laurie*, 1 Mo. App., 371; *Green vs. Tanner*, 49 Mass., 411; *Kemp vs. Walker*, 16 Ohio, 118; *Hubbard vs. Taylor*, 5 Mich., 155.

That there is no law requiring a debtor, however insolvent, to keep his property until a creditor can attach it or have it levied upon by an execution. Such a debtor may, in good faith, and for a valuable consideration, sell all his property and

apply the proceeds thereof to the payment of any one or more of his creditors, as he may see fit, if done in good faith, although it be done with the intention of defeating his other creditors.

You are instructed, that a conveyance of property made in good faith to pay an honest debt, is not fraudulent, though the debtor be insolvent and the creditor is aware, at the time of the sale, that it will have the effect of defeating other creditors in the collection of their debts.

In order to avoid the conveyance on the ground of fraud, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, if done in good faith, though others are thereby deprived of all means of obtaining satisfaction of their equally meritorious claims. *Gray vs. St. John*, 35 Ill., 222.

§ 19. **Sale on Credit.**—The jury are further instructed, as a matter of law, that in the case of an absolute and unconditional sale of goods, the fact that the vendor was indebted at the time, that the sale was on credit, and that notes taken for the unpaid price were to be used in the payment of his debts, will not alone establish fraud in such sale as against his creditors. *Miller et al. vs Kirby*, 74 Ill., 242.

§ 20. **Debtor may Prefer a Creditor.**—That a debtor may prefer one creditor, paying him in full, thus exhausting his whole property, leaving nothing for his other creditors. He may, also, partially pay a portion of his creditors in unequal payments, and wholly neglect his other creditors, and yet the law will not disturb such disposition of his property, if done in good faith.

You are further instructed, as a matter of law, that a debtor in failing circumstances has a right to prefer one creditor to another, and to pay one creditor with goods obtained on credit from another creditor.

And in this case, if you believe, from the evidence, that M. was lawfully indebted to defendant, and finding that he could not pay all his debts, transferred the goods in controversy to

defendant, in payment, or in part payment, of such indebtedness, then, upon the question of the ownership of the goods, you should find a verdict for the defendant, unless you further believe, from the evidence, that the defendant had notice of the fraud practiced by M. in obtaining possession of the goods, if such fraud has been proven. *Butters vs. Haughwout*, 42 Ill., 18.

§ 21. **Preferring Wife as Creditor.**—A husband indebted to his wife, may prefer her to his other creditors, and make a valid appropriation of his property to pay her claim, even though he is thereby deprived of the means to pay other debts. *Ferguson vs. Spear*, 65 Me., 277; *Hill vs. Bowman*, 35 Mich., 191.

§ 22. **Purchaser must be Chargeable with Notice of Fraud.**—The jury are instructed, as a matter of law, that it is not sufficient, to vitiate a sale of personal property, that it was made by the vendor to hinder, delay or defraud his creditors. In order to vitiate such sale as against the purchaser, he must have had knowledge or notice of such intent on the part of the seller. *Miller vs. Kirby*, 74 Ill., 242; *Hatch vs. Jordan*, 74 Ill., 414; *Preston vs. Turner*, 36 Ia., 671; *Drummond vs. Couse et al.*, 39 Ia., 442.

The court instructs you, that while our statute declares, every sale or assignment which is made with intent to defraud, hinder or delay creditors in the collection of their debts void, still such sale or assignment will not be void as against the purchaser, unless he knew, or had good reason to suppose, that the sale was made by the seller with intent to defraud his creditors, or to hinder or delay them in the collection of their debts. Bump on Fraud. Conv., 195; *Preston vs. Turner*, 39 Ia., 671; *Gentry vs. Robinson*, 15 Mo., 260; *Lipperd vs. Edwards*, 39 Ind., 165; *Hicks vs. Stone*, 13 Minn., 434.

You are further instructed, that although they may believe, from the evidence, that A. B. sold the property in controversy to the plaintiff for the purpose of hindering or delaying his creditors, still, if you further believe, from the evidence, that the plaintiff, at the time of the purchase, had no notice or knowledge of such purpose, then the sale would not be fraud-

ulent or void, as to the plaintiff, by reason of the fraudulent intent on the part of the said A. B.

You are instructed that to impeach a sale of personal property upon the ground of a fraudulent intent on the part of the seller, it is not necessary to establish a fraudulent intent on the part of the purchaser; it will be sufficient if the evidence shows that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon inquiry, which would have led to a knowledge of the fraudulent purpose of the seller. *Jones vs. Hetherington*, 45 Ia., 681; *Zuver vs. Lyons*, 40 Ia., 510.

§ 23. **Creditor not Affected by Knowledge, When.**—The jury are instructed, that when a person purchases goods with the knowledge that his vendor intends by the sale to defraud his creditors, or to hinder and delay them in the collection of their debts, such purchaser will not be affected if he takes the goods, in good faith, in payment of an honest debt. A creditor violates no rule of law when he takes payment of his debt, though he knows that other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims. *Gray vs. St. John*, 35 Ill., 222.

§ 24. **What is Sufficient Notice of Fraudulent Intent.**—The court instructs the jury, that when a transfer of property is made, with intent on the part of the person making it to hinder, delay or defraud his creditors, and the party to whom the transfer is made has knowledge of facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred, by an ordinarily cautious person, then such transfer is fraudulent and void as against the rights of the creditors. *Boies vs. Henney*, 32 Ill., 130.

§ 25. **Honest Intent Presumed.**—The court instructs the jury, that the law presumes that all persons transact their business honestly and in good faith, until the contrary appears, from a preponderance of the evidence; and the burden of proving fraud is always on the party alleging it.

You are instructed, that all persons are presumed to be innocent of intentional wrong until they are proved to be

guilty; and all persons are presumed to transact their business in good faith, and for a lawful purpose; and when an act can as well be attributed to an honest intent and purpose, as to a corrupt or unlawful one, then the jury are bound to attribute the act to an honest intent and to a lawful purpose.

CHATTEL MORTGAGE AS AGAINST JUDGMENT CREDITORS.

NOTE.—The validity and legal effect of chattel mortgages are mostly matters of statutory regulation. The following instructions, relating to chattel mortgages, are drawn with reference to the laws of Illinois.

§ 26. **Good Between the Parties without Recording.**—The court instructs the jury, that the chattel mortgage, introduced in evidence in this case, if made and received in good faith on the part of the mortgagee, is sufficient to invest him with the right to take the property therein described and to retain it for the purpose of selling it, as provided in the mortgage, even though it has not been recorded as required by law. *Fuller vs. Paige*, 26 Ill., 358.

§ 27. **As to Creditors, Must be Acknowledged and Recorded.**—The jury are instructed, that, as between the parties to it, a chattel mortgage is valid and binding without being acknowledged or recorded, as provided by statute.

But to render a chattel mortgage valid as to third parties, such as creditors and purchasers, in good faith, it must be acknowledged before the justice of the peace in the town where the mortgagor resides, and an entry of the mortgage, containing a description of the property mortgaged, must be entered on the justice's docket; and the mortgage must also be filed for record in the office of the recorder of deeds of the county where the mortgagor resides.

If the chattel mortgage is not acknowledged before a justice of the peace of the town where the mortgagor resides, and an entry of it made on his docket, or if it is not filed for record in the office of the recorder of deeds, then, as to the creditors of the mortgagor, it will be invalid, and they may levy an execution on the property, as though no mortgage had been made. *Porter vs. Dement*, 35 Ill., 478.

The jury are further instructed, that a chattel mortgage not

acknowledged or recorded, though obligatory and binding between the parties to it, is void as to creditors and purchasers in good faith. *Forest vs. Tinkham*, 29 Ill., 141.

§ 28. **Mortgagee Must See to Statutory Requirements.**—The court instructs the jury, that it is the duty of the mortgagee to see that his mortgage is entered upon the docket of the justice before whom it was acknowledged, and to see that a correct description of the property covered by the mortgage is entered upon the justice's docket; otherwise, if the property, or any portion of it, is incorrectly or erroneously described on the docket, in any material particular, the mortgage itself will be invalid, as against purchasers and creditors, so far as the misdescription extends.

It is the business of the mortgagee to see that all these requisites to the validity of the mortgage are complied with, for the omission to do so will be at his peril.

§ 29. **Acknowledgment and Recording, How Proved.**—The court instructs the jury, that the certificate of the justice of the peace, indorsed on the mortgage, is *prima facie* evidence that the mortgage was duly acknowledged before such justice, and entered upon his docket as required by law. And the certificate of the recorder, indorsed on the mortgage, is *prima facie* evidence that it was duly recorded at the time therein stated.

§ 30. **Mortgagee Must Take Possession of the Property, When.**—The court instructs the jury, that the law requires a person having a chattel mortgage on property, in order to hold the property as against innocent purchasers and creditors, to take possession of the property, under the mortgage, as soon as it can reasonably be done, after the debt which it is made to secure becomes due. If there is any unnecessary delay in taking such possession of the property, then the property will be liable to be levied upon, or sold as the property of the mortgagor. *Barbour vs. White*, 37 Ill., 164.

§ 31. **Fraudulent Mortgage Void.**—In determining the question, whether the mortgage in this case was made in good

faith, the jury should take into consideration all the facts and circumstances proved on the trial; and if the jury believe, from all the evidence in the case, that the mortgage was not made in good faith, or for a valuable consideration, but was made for the purpose of covering up the property of the mortgagor, so as to keep it from his creditors, then these facts would render the mortgage fraudulent and void, as to third persons having claims or liens on the property covered by the mortgage.

That although you may believe, from the evidence, that the mortgagor was indebted to the plaintiff, to the amount of the debt mentioned in the mortgage, at the time the same was made, still, if you further believe, from the evidence, that the parties to the mortgage put a much larger amount of property in the mortgage than was reasonably necessary to secure the said debt, and that such excess of property was put into the mortgage by the parties thereto for the purpose of covering the same up, and with an intent to hinder, delay or defraud the creditors of said mortgagor in the collection of their debts, these facts would render the said mortgage void as to such creditors, and you should find for the defendant.

§ 32. **Note for More than Amount Due.**—Although the jury may believe, from the evidence, that there was a good consideration for the said note, to the extent of \$125, still, if the jury further believe, from the evidence, that there was no consideration for more than that amount, and that the said note and chattel mortgage were given for a greater amount than was due, for the purpose of defrauding, hindering and delaying creditors of the said mortgagor, then the said note and mortgage are wholly void, and confer no right whatever upon the said, etc., — not even for the \$125. See *Hoey vs. Pierron*, 67 Wis., 262.

§ 33. **Mortgage of Stock of Goods.**—The court instructs the jury, that a chattel mortgage of a stock of goods, used in the way of retail trade, and where the mortgagor is allowed to continue in the possession of the property, and to sell the goods in the usual course of trade, is, in law, fraudulent and void, as against the creditors of the mortgagor, no matter

whether the parties intended any actual fraud or not. *Davis vs. Ransom*, 18 Ill., 39.; *Cheatham vs. Hawkins*, 80 N. C., 161; *Peiser vs. Peticolos*, 50 Tex., 638; *Anderson vs. Patterson*, 64 Wis., 557.

§ 34. **Both Parties Must Intend the Fraud.**—Although the jury may believe, from the evidence, that the said A. B. made the chattel mortgage, with intent to defraud, hinder or delay his creditors, still, if the jury further believe, from the evidence, that the plaintiff was not a party to such fraud, and had no notice or knowledge of such fraudulent intent, but took the mortgage in good faith and to secure a *bona fide* indebtedness, then the plaintiff will in no manner be affected by the fraudulent intent and purposes of the said A. B.

If you further believe, from the evidence, that the mortgage was acknowledged before a justice of the peace of the town, in which the mortgagor lived at the time, and that it was entered upon his docket, and then filed for record in the recorder's office of this county; and further, that it was so filed before the execution in question came into the hands of the officer (*or was levied on the property*), then you should find the property in the plaintiff.

§ 35. **Good Faith, How Proved.**—The court instructs the jury, that in order to prove the good faith of the note and mortgage, it is not necessary for the mortgagee to show the consideration by those who saw the same paid or delivered. It may be shown by the proof of facts and circumstances which indicate good faith and valuable consideration.

§ 36. **Intent to Defraud Must Exist at Time of, etc.**—To render a chattel mortgage fraudulent, the intent to defraud must exist when the mortgage is made. The mortgagor's subsequent conduct in dealing with the property, while it may be considered by the jury in determining whether there was fraud in the making of the mortgage, will not itself render the mortgage void. *Horton vs. Williams*, 21 Minn., 187.

§ 37. **Subsequent Acts will not Render Void.**—If the jury believe, from the evidence, that the chattel mortgage in ques-

tion was originally made in good faith, and to secure a *bona fide* indebtedness, then the mode of sale under the mortgage, or the disposition of the property remaining after payment of the indebtedness secured by the mortgage, can have no effect to render the mortgage itself invalid or fraudulent, at the time it was made.

§ 38. **Sale by Mortgagor.**—If the jury believe, from the evidence, that the chattel mortgage introduced in evidence was made in good faith, and to secure a *bona fide* indebtedness, then, even though the jury should further believe, from the evidence, that the mortgagor, from time to time, sold off certain portions of the property, with the knowledge and consent of the mortgagee, these facts alone would not render the mortgage void as to the balance of the property. *Jaffray vs. Greenbaum*, 64 Ia., 492.

§ 39. **Mortgage to Secure Future Advances.**—The court instructs the jury, that a chattel mortgage, made in good faith, to secure an existing indebtedness, and also further advances, may be a good and valid mortgage. It is not essential to the validity of such a mortgage that it should show, on its face, that it was made in part to secure such future advances. *Bump on Fraud. Conv.*, 229; *Speer vs. Skinner*, 35 Ill., 282; *Miller vs. Lockwood*, 32 N. Y., 293; *Shirras vs. Craig*, 7 Cranch, 34; *Tulley vs. Harlow*, 35 Cal., 302; *Brown vs. Kiefer*, 71 N. Y., 610.

If you believe, from the evidence, that the note and mortgage in this case, were given to secure an actual indebtedness existing at the time, as well as to secure further advances, loans or credits, contemplated by the parties at the time the mortgage was made, then the fact that the note and mortgage were made for more than was actually due at the time, does not alone render them void.

You are instructed that although the taking of the mortgage by the mortgagee for a greater amount than was actually due may be regarded as one of the badges of fraud, yet this fact alone does not render the mortgage fraudulent or void, if no fraud was really intended. *Pike vs. Colvin*, 67 Ill., 227.

If you believe, from the evidence, that the consideration

of the note and mortgage in question, was, in part, a former indebtedness, due from the mortgagor to the mortgagee, and in part for money loaned at the time they were given, and in part to secure future advances agreed to be made by the mortgagee to the mortgagor, this would not render the mortgage void, if made in good faith, and not to hinder, delay or defraud creditors.

§ 40. **Possession by the Mortgagee.**—If the jury believe, from the evidence, that the mortgagee had taken possession of the property in question under the mortgage, and was in possession of it at the time the attachment writ was levied, then it is immaterial whether the mortgage was recorded or acknowledged before the justice of the peace in the town where the mortgagor lived.

If you believe, from the evidence, that the mortgage introduced in evidence in this case, was made in good faith, and given for a good and valuable consideration, and that the mortgagee had taken the property, and was in possession of it under the mortgage when the attachment writ (*or execution*) was issued and levied, then the mortgagor had but a right of redemption in the property, and this right would not be subject to be taken by the creditors of the mortgagor, unless they first paid to the mortgagee the amount of his claim against the property. *Nash vs. Norment*, 5 Mo. App., 545.

§ 41. **Possession by the Mortgagor after Default.**—The jury are instructed, as a matter of law, that when mortgaged chattels have been reduced to possession, after default, and the title has become absolute in the mortgagee, he may then loan the property to the mortgagor, precisely as he might any of his other property, and such repossession by the mortgagor would not render the mortgage, or the mortgagee's title under it, fraudulent or void as to creditors. *Funk vs. Staats*, 24 Ill., 632.

§ 42. **Mortgage to Secure Contingent Liability.**—Although the jury may believe from the evidence that the said A. B. was not indebted to the plaintiff at the time he made the mortgage in question, still if the jury further believe from the evidence

that at that time the plaintiff was security for the said A. B. as (a guarantor) on certain notes, etc., and that the said chattel mortgage was in good faith given to secure the said plaintiff against his contingent liability as such guarantor, then the said mortgage would be a good and valid security in favor of said plaintiff. *Goodheart vs. Johnson*, 88 Ill., 58.

§ 43. **Taking Possession before Debt Due.**—The jury are instructed that under the mortgage introduced in evidence it was competent for the defendant to take possession of and sell the mortgage property at any time when he should deem himself insecure, notwithstanding the debt had not matured or become due and payable, and if the jury believe, from the evidence, that the property in question was embraced in the mortgage, and that the defendant, when he took the property in good faith, deemed himself insecure, then he had a right to take the property, when he did take it, and on that point the jury should find for the defendant. *Evan vs. Graham*, 50 Wis., 450.

§ 44. **Sale by Mortgagor for Benefit of Mortgagee.**—Although the jury may believe from the evidence that after the said mortgage was given the mortgagor was permitted by the plaintiff to sell and dispose of portions of the property covered by the mortgage, still this would not render the mortgage void as to the creditors of the mortgagor, provided the jury further believe, from the evidence, that the said A. B. was actually indebted to the plaintiff—that the mortgage was made in good faith to secure such indebtedness and that the permission by the plaintiff to sell such property was given in writing and only upon condition that the avails of such sales should be turned over to the plaintiff to be used in discharge of the indebtedness secured by the mortgage. *Goodheart vs. Johnson*, 88 Ill., 58.

CHAPTER XXII.

FRAUDS, FALSE REPRESENTATIONS, ETC.

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§ 1. False Representations.—The court instructs the jury, as a matter of law, that if one person represents to another as true that which he knows to be false, and makes the representation in such a way and under such circumstances as to induce

a reasonable man to believe that the matter stated is true, and the representation is meant to be acted upon, and the person to whom the representation is made, believing it to be true, acts upon the faith of it, and suffers damage thereby, this is fraud sufficient to sustain an action for deceit. 2 Hill on Torts, 138; Cooley on Torts, 175.

§ 2. **Proof of Fraud.**—The court instructs the jury, that while fraud is not to be presumed without proof, yet fraud, like any other fact, may be proved by proving circumstances from which the inference of fraud is natural and irresistible; and if such circumstances are proved, and they are of such a character as to produce, in the mind of the jury, a conviction of the fact of fraud, then it must be considered that fraud is proved. Cooley on Torts, 475; *Watkins vs. Wallace*, 19 Mich., 57; *Daniel vs. Baca*, 2 Cal., 326; *Waddingham vs. Loker*, 44 Mo., 132; *Strauss vs. Kranert*, 56 Ill., 254; *Bumpus vs. Bunkus*, 59 Mich., 95.

That while it is true the law never presumes fraud without some evidence of it, yet in order to show fraud, direct and positive proof is not required; the jury may infer fraud from the circumstances proved by the evidence, if, in the mind of the jury, they are such as to show that a fraud was practiced, as charged in the declaration.

The jury are instructed, as a matter of law, that fraud may be proved by circumstantial evidence, as well as by direct and positive proof. It may be inferred from strong presumptive circumstances. And if the jury believe, from all the evidence in this case, that (*repeating the charges in the declaration*), then the jury should find for the plaintiff. .

§ 3. **Fraud is Never to be Presumed**, but must be affirmatively proven by the party alleging the same. The law presumes that all men are fair and honest—that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay or defraud others; where a transaction called in question is equally capable of two constructions—one that is fair and honest and one that is dishonest—then the law is that the fair and honest construction must prevail and the transaction called in question must be presumed to be fair and honest. *Schroeder vs. Walsh*, 120 Ill., 410.

§ 4. **Degree of Proof Required.**—That while it is true that the party alleging fraud must prove it, yet, in a civil action like this, the party alleging the fraud is not bound to prove it beyond a reasonable doubt. It is sufficient if the fact of fraud is established, in the minds of the jury, by the greater weight of the evidence. If, after a consideration of all the facts and circumstances proved, the jury believe, from the evidence, the defendant was guilty of the fraud, as charged in the declaration, and that the plaintiff has sustained damage thereby, they should find the issues for the plaintiff.

§ 5. **Representations must be of the Past or Present.**—The jury are instructed, that before a party can annul or treat a contract as void, by reason of alleged false or fraudulent representations used in procuring it to be made, it must appear, from the evidence, that the alleged false or fraudulent representations were made regarding something which has already transpired, or was then alleged to exist. No statement of one's opinions as to what will or will not happen, or exist, in the future, can affect a contract or render it void. Every person, in making a contract, is at liberty to speculate or express opinions as to future events, and he cannot be held to answer for their truth or falsity. *Cooley on Torts*, 483, 486; *Payne vs. Smith*, 20 Ga., 654; *Reed vs. Sidener*, 32 Ind., 373; *Bristol vs. Braidwood*, 28 Mich., 191; *Tuck vs. Downing*, 76 Ill., 71.

§ 6. **Must be Designed to Injure.**—The jury are instructed, that in order to constitute actual fraud there must be contrivance and design to injure another. Actual fraud is not to be presumed, but it must be proved by the party alleging it, by a preponderance of evidence; and although actual fraud may be proved by proof of facts and circumstances tending to show fraud, still, if the motive and design of an act can as well be traced to an honest and legitimate source as to a corrupt or dishonest one, the former must always be preferred.

§ 7. **Injury Must be Shown.**—The jury are instructed, that in order that the defendant may avail himself of the defense of fraud, set up in the pleas in this case, the jury must believe, from the evidence, not only that the statements and

representations set forth in said pleas were made, but also that such statements and representations were false—that they were made with intent to deceive and defraud the defendant—that the defendant was induced thereby to enter into the contract, and that he has sustained damage by reason thereof. *Mitchell vs. Deeds*, 49 Ill., 410; *Cole vs. Miller*, 60 Ind., 463.

The court instructs you that a mere fraudulent representation is not of itself actionable. To entitle the plaintiff to recover, he must not only show, by preponderance of evidence, that the representations were made, and that they were false and fraudulent, but he must also show affirmatively, by a preponderance of evidence, that he has been injured thereby—that he is in some way placed in a worse condition than he would have been had the statements been true. *Bartlett vs. Blaine*, 83 Ill., 25.

§ 8. **Scienter Must Appear from the Evidence.**—The jury are instructed, that while fraud vitiates every contract, every false affirmation does not amount to fraud. To constitute fraud, a knowledge of the falsity of the representation must rest with the party making it, and the representation must be made with the intention that the other party shall act upon it, and it must also appear that the other party did act upon the representation, to his injury. *Walker vs. Hough*, 59 Ill., 375; *Dwight vs. Chase*, 3 Ill. App., 67.

§ 9. **Expression of Opinion, Bragging, etc.**—The jury are instructed, that a purchaser cannot maintain an action against his vendor for false statements in regard to the value of the property purchased, or its good qualities, or the price he has been offered for it. *Dillman vs. Nadelhoffer*, 19 Ill. App., 375.

That when a party, capable of taking care of his own interests, makes a bad or losing bargain, the law will not assist him, unless deceit has been practiced, against which ordinary care could not protect him. *Noetling vs. Wright*, 72 Ill., 390; *Reel vs. Ewing*, 4 Mo. App., 569; *Livingston vs. Strong*, 107 Ill., 295.

You are instructed, that when parties are negotiating a trade

for property, which there is an opportunity for examining, each has a right to exalt the value of his own property to the highest point the other party's credulity will bear, and depreciate the value of the other's property. Such boastful assertions, or highly exaggerated descriptions, do not amount to fraudulent misrepresentation or deceit. In such case, the parties are upon equal ground, and their own judgments must be their guide in coming to conclusions. *Cooley on Torts*, 483; *Payne vs. Smith*, 20 Ga., 654; *Bristol vs. Braidwood*, 28 Mich., 191; *Miller vs. Craig*, 36 Ill., 109; *Reed vs. Sidener*, 32 Ind., 373; *Ellis vs. Andrews*, 56 N. Y., 83; *Bante vs. Savage*, 12 Nev., 151.

All statements by a vendor of the value of property sold, are not necessarily matters of opinion; if the vendor, knowing them to be untrue, makes them with the intention of misleading the purchaser, and of inducing him to forbear making inquiries as to the value of the property; and if the vendee has not equal means of knowledge, and is induced by the statements of the vendor to forbear making inquiries which he otherwise would have made, and, relying on such statements, is misled, to his injury, he may avoid the contract or recover damages for the injury. *Simar vs. Canaday*, 53 N. Y., 298; *Nowlin vs. Snow*, 40 Mich., 699; *Bacon vs. Frisbie*, 15 Hun (N. Y.), 26.

§ 10. **Representation as to the Law.**—That a representation as to what the law will or will not permit to be done, or a representation regarding the legal rights of a party, is one upon which the party to whom it is made, has no right to rely; and if he does so, it is his own folly, and he cannot ask the law to relieve him from its consequences. *Fish vs. Clelland*, 33 Ill., 238; *Townsend vs. Cowles*, 31 Ala., 428; *People vs. Supervisors, etc.*, 27 Cal., 655; *Rogers vs. Place*, 29 Ind., 577; *Upton vs. Tribilcock*, 91 U. S. Rep., 45-49; *Am. Ins. Co. vs. Capps*, 4 Mo. App., 571.

§ 11. **Mere Silence is not Fraud, When.**—That mere silence or a failure to communicate facts within the seller's knowledge, is not such a fraud as will avoid a contract, or render the seller liable. To have that effect, there must be some conceal-

ment, as by withholding information when asked, or using some trick or device to mislead the purchaser. The seller may let the purchaser cheat himself, if he sees fit to do so, but he must not assist him, even to cheat himself. *Kohl vs. Lindley*, 39 Ill., 195.

§ 12. **Purchaser Knowing Himself Insolvent.**—The jury are instructed, that although they may believe, from the evidence, that the defendant, at the time he purchased the goods in question, was insolvent and knew himself to be so, and did not disclose that fact to the person of whom he purchased the goods, still the defendant would not be guilty of fraud so as to vitiate the contract of sale; provided, the jury further believe, from the evidence, that he then intended to pay for the goods, and had reasonable grounds for believing that he would be able to do so. *Talcott vs. Henderson*, 31 Ohio St., 162.

§ 13. **Purchase with Intent not to Pay.**—The jury are instructed, as a matter of law, that in order to render a purchase of property fraudulent, as between the parties, it is not necessary that there should have been any false representations made by the purchaser to effect his purpose. If the jury believe, from the evidence, and from the facts and circumstances proved on the trial, that the purchase in question was made by the purchaser with the intention not to pay for the property, then the transaction was fraudulent and void, and vested no title in the purchaser. *Cooley on Torts*, 477; *Bowen vs. Schuler*, 41 Ill., 192; *Shipman vs. Seymour*, 4 Mich., 274; *Flower vs. Farewell*, 18 Ill. App., 254.

§ 14. **Drawing Check without Funds.**—The jury are instructed, that a person who draws a check or order upon a person in whose hands he has no funds, and who he has no reason to believe will honor the check or order, is guilty of fraud; and if he thereby acquires possession of property, the owner may repudiate the sale, and bring trover or replevin for the property so obtained. *Mathews vs. Cowan*, 59 Ill., 341.

§ 15. **Sale of Personal Property—Concealed Defects.**—If the

jury believe, from the evidence, that the plaintiff bought the horse in question from the defendant, and that the defendant shortly before, and at the time of the sale, stated and represented to the plaintiff that the horse was sound and true, and that the plaintiff believed such statements and representations, and relied upon them in making the purchase; and if the jury further believe, from the evidence, that at the time such representations and sale were made, the said horse was not sound, but then had a concealed disease or defect, which rendered him unsound, and which could not be perceived by ordinary skill or observation at the time, but which was known to the defendant, then the defendant will be liable to the plaintiff for the damages sustained by him by reason of such unsoundness, if any has been shown by the evidence.

§ 16. **Purchaser Must Exercise Reasonable Care.**—The jury are further instructed, that if they believe, from the evidence, that the defect complained of was of such a nature and size, and so obvious and visible to the senses that it could have been discovered by the exercise of ordinary care and diligence, in looking at and examining the horse, then the defendant is not liable in this suit, unless the jury further believe, from the evidence, that the defendant used some artifice or trick to prevent the plaintiff from seeing or discovering the defect. *Ward vs. Borkenhagen*, 50 Wis., 459.

§ 17. **Contract Procured by Fraud.**—If the jury believe, from the evidence, that any untrue statements, as to the then market value of (*live hogs*) in the (*Chicago*) market, were made by the plaintiffs, or by their agent, as an inducement to the defendant to enter into the contract in question, and that the defendant relied upon such statements, and was induced thereby to enter into the contract, then such contract is voidable as against the defendant, and it cannot be enforced as against him.

If you believe, from the evidence, that the parties made the contract, as alleged by the plaintiffs, still, if you further believe, from the evidence, that at the time of the making of the contract the plaintiffs, or either of them, willfully and knowingly, by untrue statements, deceived the defendant in

regard to the then market-value of the property in question, as an inducement to him to enter into the contract, and that the defendant, under the circumstances, was justified in relying upon the statements made to him, and did rely upon them in entering into the contract, then the defendant cannot be held to the performance of such contract, and your verdict should be for the defendant.

§ 18. **Stating as True—When a Party has no Reason for Belief, etc.**—The court instructs the jury, that any willful misrepresentation of a material fact, made with a design to deceive another, and to induce him to enter into a trade he would not otherwise make, will enable the party who has been overreached to annul the contract; and it makes no difference whether the party making the misrepresentation knew it to be false or whether he was ignorant of the facts stated; provided, the matter stated was material, and the party making the statement stated it as true, when, in fact, he had no apparently good reason for believing it to be true, and when the other party, under the circumstances shown by the evidence, was reasonably justified in relying upon the statement, and did rely upon it in making the trade, and was deceived and injured thereby. *Cooley on Torts*, 500; *Beebe vs. Knapp*, 28 Mich., 53, 76; *Allen vs. Hart*, 72 Ill., 104; *Litchfield vs. Hutchinson*, 117 Mass., 195.

That material representations, made by a vendor, of matters assumed by him to be within his personal knowledge, are false and fraudulent, in a legal sense, if made with intent to deceive the vendee, and if they are untrue, and are relied upon by the vendee in making the purchase, to his damage, although the vendor did not know them to be untrue. *Ind. P. & C. Rd. Co. vs. Tyng*, 63 N. Y., 653.

The law is, if a person recklessly makes a false representation of the truth of a matter of which he knows nothing, for the fraudulent purpose of inducing another to rely upon his statements, and to make a contract or do any act to his prejudice, and the other party does so rely and act upon it, and thereby suffers an injury, the party making the representation is liable in an action for fraud and deceit, as much so as if he had known the statement to be false at the time it was made. *Beebe vs. Knapp*, 28 Mich., 53.

Whether in this case the defendant made the representations alleged, and whether they were false; and if he did make them, whether they were made for the fraudulent purpose alleged, are questions exclusively for the jury, to be determined by the weight of the evidence in the case.

§ 19. **Suit for Fraud—What Must be Proved.**—The jury are instructed, that this action is founded upon a charge of fraud and deceit, and in order to constitute fraud, within the meaning of the law, under the pleadings in this case, it must appear, by a preponderance of the evidence, that the defendant intended to commit and did commit a fraud upon the plaintiff, in manner and form as charged in his declaration, otherwise he cannot recover, and the jury should find for the defendant.

That the plaintiff is not entitled to recover in this case unless you believe, from the evidence, that the defendant made the representations alleged in the declaration; that such representations were false; that defendant knew they were false, or had no apparently good reason to believe they were true; that they were made with intent to defraud the plaintiff; that plaintiff was induced thereby to make the trade in question, and has sustained damage by means thereof. *Cooley on Torts*, 474; *Eames vs. Morgan*, 37 Ill., 260; *McKown vs. Furgason*, 47 Ia., 636.

§ 20. **All the Representations Need not be Proved.**—To entitle the plaintiff to recover in this case, it is not necessary that he should show that all the representations charged were made by the defendant, or, if made, that they were all untrue; it is sufficient if the jury believe, from the evidence, that some of the representations were made as charged, that they were untrue and known to be so at the time by the defendant, or that he had no good reason to suppose them to be true, that they were calculated to deceive an ordinarily cautious person, and were intended by the defendant to deceive and defraud the plaintiff—that without such false and fraudulent representations the property would not have been delivered (or the credit given) and that the plaintiff has been damaged by the fraudulent acts of the defendant. *Smith vs. The State*, 55 Miss., 513; *Beasley vs. The State*, 59 Ala., 20.

§ 21. **Action not on the Contract.**—The court instructs the jury, that this suit is not brought upon the contract given in evidence, but upon the alleged fraud and deceit set forth in the declaration, and the alleged loss resulting therefrom to the plaintiff; and if the jury believe, from the evidence, that the defendant was guilty of the fraudulent acts set forth and charged in the declaration, and that the plaintiff has sustained any damage or loss by reason thereof, then the jury should find the defendant guilty, and assess the plaintiff's damages.

§ 22. **Co-Defendant not Guilty.**—Though the jury may believe, from the evidence, that the defendant A. B. made the trade in question with intent to defraud the plaintiff, still, if the jury further believe, from the evidence, that the other defendants, or either one of them, took no part in the trade, and had no knowledge of such intent, then the act of A. B. would not bind such other defendant or defendants as did not take part in the trade, and did not have knowledge of such intent; unless it further appears, from the evidence, that such trade was made in the interest of such other defendant or defendants, or that he or they have since ratified the same.

If you believe, from the evidence, that the transaction complained of took place between the plaintiff and the defendant A. B., and that the other defendants had no part in or knowledge of the transaction when it occurred, and no interest therein, and have not since ratified or approved of the act, as explained in these instructions, then such other defendants cannot be made liable for the acts of the said A. B.

§ 23. **Sales—Procured by Fraud.**—The court instructs the jury, as a matter of law, that actual fraud vitiates and will render void, at the election of the party injured, all contracts; and a fraudulent purchaser acquires no title to goods procured through fraudulent representation.

And if a purchase of goods is effected by means of false and fraudulent representations on the part of the purchaser, known by him to be false, and which are relied upon by the seller, and but for which he would not have made the sale, then the seller does not, as against the purchaser, lose his title to the goods, and he may bring trover or replevin for them against the purchaser, without first making a demand for them.

And in such a case, if the purchaser has given a note or notes for the price of the goods, the seller may bring his suit without making a previous tender of the notes; provided, the notes are produced at the trial to be surrendered to the defendant. *Coghill vs. Boring*, 15 Cal., 213; *Thurston vs. Blanchard*, 22 Pick., 18; *Nichols vs. Michael*, 23 N. Y., 264.

§ 24. **Right to Rescind.**—The court instructs the jury, that the law is, that where a person is induced to part with his property, under a contract procured by fraud, on discovering the fraud he may avoid the contract and claim a return of the property. He has his election to affirm or disaffirm the contract, but if he disaffirms it, he must do so at the earliest practicable moment after the discovery of the fraud. *Cooley on Torts*, 503; *Cochran vs. Stewart*, 21 Minn., 435; *Hall vs. Fullerton*, 69 Ill., 448; *Wright vs. Pelt*, 36 Mich., 213; *Pearsoll vs. Chapin*, 44 Penn. St., 9.

§ 25. **Sale not Void, but Voidable.**—That fraud, in the sale or purchase of personal property, does not render the transaction void, but only voidable, at the option of the party defrauded. The vendor, when defrauded, may either avoid the contract, or he may ratify it, while the property remains in the hands of the purchaser; but after the property has passed into the hands of a *bona fide* purchaser from the fraudulent vendee, the seller cannot reclaim the property. *Mich., etc., Rd. Co. vs. Phillips*, 60 Ill., 190.

§ 26. **Contract May be Ratified, How.**—The court instructs the jury, that even when a sale of goods is procured by the fraud of the purchaser, the contract of sale is not absolutely void; but the contract may be either avoided or ratified by the seller; and if the seller does not, within a reasonable time after discovering the fraud, do some act showing an intention to rescind the sale, he will be held in law to have ratified the sale.

Where a sale of goods is procured by the fraudulent representations of the purchaser, the contract of sale is not absolutely void, but it may be either avoided or ratified by the seller.

And in this case, if you believe, from the evidence, that the plaintiffs, after they discovered the fraud claimed by them (*brought a suit against the purchaser for the price of the goods sold*), that would be a ratification of the sale, and the plaintiffs would not now be permitted to claim the goods, as against the creditors of the purchaser, who had had an execution levied upon them.

Where a party undertakes to rescind the contract of sale, on the ground of the fraud of the other party, he must, as soon as the fraud is discovered, take all reasonable measures to rescind it; and if he undertakes to rescind the contract, he must rescind the whole of it, and if he has received any money, or other valuable thing under the contract, he must return, or offer to return the same, so as to place both parties in the same condition that they were in before the sale. Cooley on Torts, 504; 2 Hill. on Torts, 141; *Babcock vs. Case*, 61 Penn. St., 427; *Jewett vs. Petit*, 4 Mich., 508; *Coghill vs. Boring*, 15 Cal., 213.

§ 27. **What is a Ratification.**—The jury are instructed, that when a party has been induced to sell property on credit by fraudulent means, he has his election either to affirm the sale or to disaffirm it on the ground of fraud; and, in such a case, if the seller, with a knowledge of all the material facts affecting his interest, takes any steps to enforce the payment of the price agreed upon, or puts it out of his power to restore the other party, as nearly as possible, to the same position he was in before the sale, he will be held to have elected to affirm the sale.

§ 28. **Innocent Purchaser from Fraudulent Vendee.**—The court instructs the jury, that when a person who has purchased goods and obtained possession of them by false and fraudulent representations, sells them to an innocent purchaser for value before they are reclaimed by the vendor, such innocent purchaser will acquire a valid title to the goods. *Cochran vs. Stewart*, 21 Minn., 435; *Ohio, etc., Rd. Co. vs. Kerr*, 49 Ill., 458; 2 Hill. on Torts, 143.

When a party sells goods and delivers them to the purchaser under circumstances which would authorize him to

rescind the sale as against the purchaser, yet, if before the sale is rescinded the purchaser sell them or pledge them as security for an advance of money, to an innocent party, without notice of the fraud, such innocent party will hold the goods as against the original owner.

§ 29. **Purchaser without Notice, etc.**—The jury are further instructed, that to entitle the plaintiff to reclaim the goods from the defendant, the jury must believe, from the evidence, that M. obtained the goods in controversy from the plaintiff by the means of false and fraudulent representations, and that the defendant, at or before the time he received them from M., had notice of the manner in which M. had obtained them from the plaintiff, or that defendant received them from M. without any valuable consideration; provided, the jury believe, from the evidence, that M. purchased the goods from the plaintiff and afterwards transferred them to the defendant.

The court instructs you, that where personal property is sold, and no time of payment is fixed by the contract, then the law will imply that payment was to be made before delivery, and before the title would vest in the purchaser; but when a purchaser acquires possession of property before payment, by fraudulent means, and sells it to a *bona fide* purchaser, without notice, for a valuable consideration, before the first sale it avoided or the property reclaimed, then the *bona fide* purchaser will hold the property as against the original owner.

§ 30. **Transferred in Payment of Debt.**—That where a person purchases and obtains the possession of goods by fraudulent representations, and then sells and delivers them to his creditor, in payment of a pre-existing debt, and the creditor accepts them *bona fide* and without any notice of the fraud of his vendor, such creditor is a purchaser for a valuable consideration, and in law will be protected as such against any claim of the original owner, to the same extent as if he had paid a new consideration for the goods, at the time he purchased them.

You are further instructed, that if you believe, from the evidence, that M. purchased the goods from the plaintiff, on credit, by means of the alleged fraud, and that the defendant, in good faith, received the goods from M. in payment or part

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payment of a pre-existing debt, then, to entitle the plaintiff to a verdict for the goods as against the defendant, you must further believe, from the evidence, that the defendant, when he received the goods, had notice that M. obtained them by means of the fraud alleged.

If you believe, from the evidence, that the defendant bought the goods in controversy from M. in good faith, in payment, or in part payment, of a debt which M. owed defendant, and without any knowledge or notice of the means by which M. obtained them from the plaintiff, then, on the question of ownership of the goods, you should find for the defendant, even though you should further find, from the evidence, that M. had obtained the goods from the plaintiff by means of false and fraudulent representations, as alleged. *Butters vs. Haughwout*, 42 Ill., 18. (*On this point the decisions in different states are not uniform.*)

§ 31. **Attaching or Execution Creditor.**—The court instructs the jury, as a matter of law, that where a party sells goods and delivers them, under circumstances which would authorize him to rescind the sale as against the purchaser, as explained in these instructions, he will have the same right, as against an attaching or execution creditor of the purchaser. *Schweizer vs. Tracy*, 76 Ill., 345.

§ 32. **Purchaser Must Exercise Reasonable Caution.**—A *bona fide* purchaser from the fraudulent vendee of personal property, before the defrauded vendor has avoided his contract of sale, will get a good title to the property.

You are instructed, that the law imposes upon one purchasing personal property, that degree of caution and diligence in ascertaining the title of his vendor, which ordinarily prudent business men usually exercise under like circumstances, and it charges him with constructive notice of such facts only, as by the exercise of such caution and diligence he would probably have discovered. *Cochran vs. Stewart*, 21 Minn., 435.

You are instructed, that every false affirmation does not amount to a fraud. If, by an ordinary degree of caution, the party complaining could have ascertained the falsity of the representations complained of, then such party is not entitled

to a verdict; and in this case, to entitle the plaintiff to a verdict, you must believe, from the evidence, not only that the representations complained of were made, but also that they were made under circumstances calculated to deceive a person acting with reasonable and ordinary prudence and caution; and in determining this question, the jury should consider all the circumstances under which the alleged representations appear, from the evidence, to have been made, and whether, under the circumstances, the representations were such as a person of common and ordinary prudence would or should have relied upon or such as would be likely to mislead such a person. *Eames vs. Morgan*, 37 Ill., 260.

§ 33. **Only Bound to Exercise Reasonable Caution.**—The jury are instructed, that although a party to a contract is bound to exercise reasonable care and caution to prevent being defrauded, still, if the party with whom he is dealing makes use of such false and fraudulent statements, representations and acts, with respect to a material inducement to the contract, as are calculated to mislead a person acting with common prudence and reasonable discretion, and such person is thereby induced to enter into a contract, or to part with property which he would not otherwise have done, then the party making use of such false and fraudulent statements, representations or acts, cannot be heard to say that the person so deceived and misled did not make such inquiries as might have resulted in a discovery of the falsity of the representations.

CHAPTER XXIII.

HIGHWAYS.

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 12. Dedication must be accepted.
 13. Owner must intend to dedicate.
 14. Dedication binding on the owner and all claiming under him.
 15. Dedication by sale of lots bounded on streets.
 16. Prescription—Twenty years' user.
 17. Prescription—Travel must be confined to a particular route.

§ 1. **How Created.**—The court instructs the jury, that a public highway may be acquired by condemnation under the statute by grant from the owner—and after (*twenty*) years' use by the public, a grant will be presumed—and by dedication to and acceptance of the highway by the public; the acceptance of the highway may be inferred from travel by the public, or from repairs made thereon by the proper public authorities. Washburn on Easements, 125; *Grube vs. Nichols*, 36 Ill., 96.

You are instructed, that the plaintiff is at liberty to rely upon establishing the existence of the road by proving either a condemnation under the statute, (*twenty*) years' continuous adverse use by the public, or dedication by the owner. And if you believe, from the evidence, that the plaintiff has proved the establishment of the road in controversy by either one of these three methods, as explained in these instructions, that is sufficient upon the question of the existence of the road. *Summers vs. The State*, 51 Ind., 201.

§ 2. **Presumption from Laying Out and Working Highway.**—If the jury believe, from the evidence, that a public road was laid out over the place in question; that it was used and traveled by the public, and that it was recognized and kept in repair as such by the public authorities for a period of (*five*) years, or more, before the commencement of this suit, then these facts furnish a presumption, liable to be rebutted by proof, that such road is a public highway. *Daniels vs. The People*, 21 Ill., 439.

§ 3. **Existence of Highway, How Proved.**—The jury are further instructed, that the plaintiff is not bound to rely on the record of the condemnation proceeding alone to establish the existence of the road in question; it is sufficient if the jury believe, from the evidence, and under the instruction of the court, that there was at the time in question a legal highway, as explained in these instructions, at the point in question.

A public highway may exist, one part by condemnation under the statute, another by prescription, which means (*twenty*) years', or more, continuous, adverse use, and still another part of the road may exist by dedication.

§ 4. **Condemnation, How Proved—Actual Location Must Prevail.**—The jury are instructed, that the plat and survey of a road made by the direction of the commissioners of highways is *prima facie* evidence of the location of the road, but it is not conclusive. If the jury believe, from the evidence, that the commissioners eventually staked, laid out and opened the road different from the plat and survey, then the actual location must be proved.

§ 5. **Monuments Control Courses and Distances.**—The jury are instructed, that the rule of law is, if there is any discrepancy between the courses and distances, as given in the order of the commissioners, and the monuments mentioned in the survey of the road, or actually placed on the ground, then the monuments must prevail. *Daniels vs. The People*, 21 Ill., 439.

The monuments and lines actually run by the surveyor in

surveying the road, and the staking and laying out the road on the ground, must always prevail in determining the location of a road. The notes of survey, and the plat returned by the surveyor are but matters of description, which serve to assist in determining the place where the road is laid, but they are not conclusive.

The actual surveying, staking, laying out and viewing the line of the road upon the ground where it is laid constitutes the location of the road; provided the road is actually opened on that line.

If you believe, from the evidence, that the surveyor actually surveyed, laid out and located the road on the ground, on what is known as the (*north*) line, under the direction of the highway commissioners, then that would be the true line, although the survey and plat called for a different line. *Hiner vs. The People*, 34 Ill., 297.

§ 6. **Prima Facie Evidence of Location.**—The court instructs the jury, that the petition, report of the commissioners, the survey and plat of the surveyor in locating the road, at the time the road is alleged to have been laid out, are required, by law, to be filed in the office of the town clerk, and when they are so filed they become a part of the public records for the use of the public. And (*the copies of*) all such papers as have been used in evidence in this case are *prima facie* evidence of the facts stated in them respectively. *Hiner vs. The People*, 34 Ill., 297.

§ 7. **What is Meant by Dedication.**—By dedication is meant a giving and granting of a right; and before the jury can find that there is a valid road by dedication, at the point in controversy, they must believe, from the evidence, that the owner of the land intended to give, and did give, to the public a right of way over the land, and that the public accepted the gift. Angell on Highways, § 132.

§ 8. **Dedication—What Constitutes.**—The jury are instructed, that to constitute a dedication of land for a highway, as regards the general public, the owner of the fee must give the right of way to the public, and it must be accepted and appropri-

ated to that use by travel, or a recognition of it as a public highway by repairs, or otherwise, by the proper public authorities. To show a dedication, the acts of both the donor and the public authorities, in these respects, must concur. *State vs. Tucker*, 36 Ia., 485; *Fisk vs. The Town of Havana*, 88 Ill., 208; *Tupper vs. Hudson*, 46 Wis., 646.

§ 9. **Dedication Must be Made by the Owner.**—The jury are instructed, that a primary condition of every valid dedication of land to public use is that it should be made by the owner of the fee. No one but the owner in fee can dedicate land to public use. *Baugan vs. Mann*, 59 Ill., 492; *Porter vs. Stone* 51 Ia., 373.

§ 10. **No Particular Ceremony Required.**—That no particular form or ceremony is necessary in the dedication of land for a public highway; all that is required is that the owner shall, in some manner, manifest an intention to dedicate it, and that the public shall accept the dedication. *Morgan vs. Railroad Co.*, 96 U. S., 716; *Skrainka vs. Allen*, 2 Mo. App., 387.

§ 11. **No Specific Time Required.**—The jury are instructed, that no specific length of possession by the public is necessary to constitute a dedication of ground as a street or highway. It is only necessary that the owner should manifest an intention to dedicate it for that purpose either by writing, by declarations or by acts, and that the public should accept the dedication as made. *City Chicago vs. Wright*, 69 Ill., 318; *Gentleman vs. Soule*, 32 Ill., 271.

To effect a dedication there must be an intention so to do, and such intention may be manifested by acts and accompanying declarations. No particular time is necessary to constitute a dedication; it may take place immediately, if the owner of the property intends it shall do so, and the public accepts it. *Rees vs. City Chicago*, 38 Ill., 322.

§ 12. **Dedication Must be Accepted.**—The jury are instructed, that a dedication of land to public use may be made by verbal declarations, if accompanied by such acts as are necessary for that purpose; but to make a valid dedication to the public, an

intention to appropriate the right to the general use of the public must exist; and in order to establish a dedication of land to the public for a street or highway, there must not only be an act of dedication of the land by the owner for that purpose, but there must be some proof of its acceptance as such by the public, acting through the proper authorities. *Kennedy vs. Le Van*, 23 Minn., 513; *Ill. Ins. Co. vs. Littlefield*, 67 Ill., 368; *Mansur vs. Haughey*, 60 Ind., 364; *Field vs. Village, etc.*, 32 Mich., 279.

§ 13. **Owner Must Intend to Dedicate.**—The jury are instructed, that there can be no valid dedication of land to public use without an intention, on the part of the owner, to so dedicate; and although the jury may believe, from the evidence, that the land at the point in question had been used by the public as a highway with the knowledge and consent of the owner, for — years before, etc., still, this alone is not sufficient to establish the existence of a highway by dedication; it must further appear, from a preponderance of the evidence, that the plaintiff intended to dedicate it to the use of the public as a highway. *Henderson vs. Alloway*, 3 Tenn. Ch., 688; *Mansur vs. State*, 60 Ind., 357.

Although it is necessary, in order to show a dedication of land to public use, that the owner intended thus to dedicate it, still, this intention may be manifested by acts or words, or partly by both, and if the jury, after considering all the evidence in the case, believe therefrom, that before, etc., that the plaintiff intended to, and did dedicate the land in question to public use, and with that intention, gave the public the right to travel thereon and to use the same as a highway, and that the public accepted the gift by using and working the road, then this is evidence from which the jury may infer that there was a dedication as claimed. *White vs. Smith*, 37 Mich., 291; *Kennedy vs. Le Van*, 23 Minn., 513.

§ 14. **Dedication Binding on the Owner, and all Claiming under Him.**—The jury are instructed, as a matter of law, that a valid dedication, when once made and accepted, is binding not only on the person making it, but also upon all persons claiming under him by deed or otherwise. *Rees vs. City of Chicago*, 38 Ill., 322.

If the jury believe, from the evidence, that A. B., while he was the owner of the land at the point in question, dedicated it to public use as a highway, as explained in these instructions, and that the public accepted the dedication, then the portion so dedicated should be deemed to be a public highway. *Town of Havana vs. Biggs*, 58 Ill., 483; *Bartlett vs. Bangor*, 67 Me., 460; *Summers vs. State*, 51 Ind., 201.

§ 15. **Dedication by Sale of Lots Bounded on Streets.**—That when the owner of land, within or near a city or village, lays it off into lots, blocks and streets, and makes a plat of the same, marking thereon the streets and lots, and then sells one or more of the lots, by reference to the plan or plat, he thereby annexes to each lot sold a right of way in the street, which neither he nor his successors in the title can interrupt or take away. *Bartlett vs. Bangor*, 67 Me., 460; *Fisher et al. vs. Beard*, 32 Ia., 346; *Waugh vs. Leech*, 28 Ill., 488.

The court instructs the jury, as a matter of law, that if the owner of a piece of land lays it out into lots and blocks, with streets and alleys, and then sells off a lot, bounding the lot by one of the designated streets, then the purchaser of the lot will acquire a right to have the street remain open for street purposes, whether it is so mentioned in the deed or not, or whether the street be accepted by the public authorities or not. *Clark vs. Elizabeth*, 40 N. J. L., 172; *Denon vs. Clements*, 3 Col., 472; *Dewitt vs. Ithaca*, 15 Hor. (N. Y.), 568; *Eastland vs. Fogo*, 58 Wis., 274.

§ 16. **Prescription—(Twenty) Years' User.**—If the jury believe, from the evidence, that a public road has been used by the public over the place in question, for (*twenty*) years or more, without interruption, and that the owners of the land have acquiesced therein during all that time, then the law presumes a grant or a dedication of the ground upon which the road runs, to the use of the public, for a common highway. *State vs. Green*, 41 Ia., 693.

The court instructs you, that a peaceable, continuous and uninterrupted use of a piece of ground, as a highway, by the public for (*twenty*) years, or more, creates what is called a prescriptive right to use the road as such; and this right con-

tinues till it is clearly and unmistakably abandoned by the public. A partial or transient non-user of a road, by reason of the travel being diverted to other roads, is not sufficient to establish an abandonment of such road. *Town of Lewistown vs. Proctor*, 27 Ill., 414; *Dexter vs. Tree*, 6 N. E. Rep., 506.

§ 17. Prescription—Travel Must be Confined to a Particular Route.—The jury are instructed, that the public cannot acquire a right by prescription; that is, by a user for (*twenty*) years, to travel over a tract of land generally. The travel and the right of way must be confined to a specific line or way, that could properly be called a road. That travel may slightly deviate from the thread of a road to avoid an obstruction, and still not change the road itself. *Kelsey vs. Furman*, 36 Ia., 614; *Davis vs. Clinton City Council*, 10 N. W. Rep., 768.

You are further instructed, that if various and distinct lines of travel have been used at different times across a piece of land, the time during which the different lines have been used cannot be so computed as to make up the requisite (*twenty*) years to establish a prescriptive right of way to any single line of road. *Gentleman vs. Soule*, 32 Ill., 271.

If you believe, from the evidence, that the public acquiesced in the placing of the obstruction complained of in the road in question, by the defendant, and that the public accepted the road spoken of by the witnesses as ("*the north road*") in lieu of the road in question, and used the said substituted road for a period of (*five*) years before the commencement of this suit, then the public have waived their right in the defendant's land at the point of the obstruction, and the plaintiff is not entitled to recover in this suit. *Grube vs. Nichols*, 36 Ill., 92.

CHAPTER XXIV.

INSURANCE.

- Sec. 1. Duty of court to interpret policy—Suit to be brought within twelve mon'hs.
2. Non-payment of premium.
 3. Estopped by uniform course of business.
 4. Application is made a warranty.
 5. Warranty as to amount of incumbrances.
 6. Fraud, knowledge of agent, knowledge of company.
 7. Condition as to other insurance.
 8. Other insurance known to the defendant.
 9. Representations as to incendiarism.
 10. Warranty as to title.
 11. Non-compliance with conditions.
 12. Furnishing proofs of loss.
 13. Waiving proofs of loss.
 14. Condition to render account of loss forthwith.
 15. When agent cannot waive proofs of loss.
 16. Premises becoming unoccupied.
 17. Premises temporarily vacant.
 18. False swearing in proofs of loss.

§ 1. **Duty of the Court to Interpret the Policy—Suit to be Brought within Twelve Months.**—The jury are instructed that it is the duty of the court to interpret and give the meaning of the contract or policy offered in evidence in this case, and the court instructs the jury that by the terms of the policy, the plaintiff cannot sustain this suit, unless it was commenced within twelve months after the loss, if any occurred, or unless the defendant has waived that provision of the policy, and if the jury believe, from the evidence, that the loss in question occurred on, etc., then the jury should find the issues for the defendant, unless the jury further believe, from the evidence, that the defendant had, in some manner, waived the necessity of commencing suit within twelve months after the loss, as explained in these instructions on that point. *Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 386; *Portage Co. Mutual Ins. Co. vs. West*, 6 Ohio St., 599; *Keim vs. Home Mutual Ins. Co.*, 42 Mo., 38;

Peoria Marine F. Ins. Co. vs. Whitehill, 25 Ill., 466; *Merchants Mutual Ins. Co. vs. La Croix*, 35 Tex., 249.

§ 2. **Non-Payment of Premium.**—If the jury believe, from the evidence, that the premium mentioned in the policy had not been paid at the time of the fire, then, under the pleadings in this case, to warrant a finding for the plaintiff, the jury must believe from the evidence that such payment was either waived by the defendant or that the defendant agreed with the plaintiff to wait for such payment until some definite period of time subsequent to the happening of the loss—and, in arriving at a conclusion upon these questions, the jury have a right to consider the conduct of the parties in reference thereto, so far as it appears in evidence, together with all the other evidence in the case. *Southern Life Ins. Co. vs. Booker*, 9 Heisk., 606; *Mich. Mutual L. Ins. Co. vs. Powers*, 42 Mich., 19; *Beadle vs. Chenango County Mutual Ins. Co.*, 3 Hill, 161; *Ayre vs. New England Mutual L. Ins. Co.*, 109 Mass., 430; *Howard vs. Continental Ins. Co.*, 48 Cal., 229.

The policy of insurance in this case contains a condition that the company should not be liable for any loss occurring when the premium note is wholly or in part past due and unpaid; and if you believe, from the evidence, that when the loss occurred, there was any portion of the premium note due and unpaid, then the defendant is not liable for such loss, unless you further believe, from the evidence, that the defendant had in some manner waived or excused the prompt payment of such premium note, as explained in these instructions. *Garlick vs. Miss. Valley Ins. Co.*, 44 Ia., 553; *Shakey vs. Hawkeye Ins. Co.*, 44 Ia., 540; *Wheeler vs. Conn. Mutual Life*, 16 Hun, 317; *Patch vs. Phoenix Mutual Ins. Co.*, 44 Vt., 481; *Sullivan vs. Cotton States L. Ins. Co.*, 43 Ga., 423.

You are instructed, that although you may believe, from the evidence, that the witness A. B. agreed with the plaintiff to extend the time of payment of the premium mentioned in the policy, until, etc., still, in order to make such agreement binding upon defendant, you must further believe, from the evidence, that such an agreement was ratified by the insurance company, or that the said A. B. was either authorized by the

company to make the contract or that the defendant had knowingly permitted him to act in such a way as to justify the plaintiff in reasonably believing that he had such authority.

§ 3. **Estopped by Uniform Course of Business.**—The court instructs you, as a matter of law, that a local agent of an insurance company may be authorized by the course of business to waive the conditions and stipulations in the policy, and the company may be bound thereby, notwithstanding the policy says that he may not do so; and if the jury believe, from the evidence, that for a number of years it had been the uniform practice of the defendant to give notice of the time when the premium would fall due, and to collect the same through a local agent residing in the neighborhood, then good faith required that this mode of collection should not be discontinued and payment required at the home office, under penalty of a forfeiture, without notice to the plaintiff. *Union Cent. Life Ins. Co. vs. Potker*, 33 Ohio St., 459; *Mound City Ins. Co. vs. Twining*, 19 Kans., 349; *Ga. Ins. Co. vs. Kinner*, 28 Gratt., 88; *McCraw vs. Old N. St. Ins. Co.*, 78 N. C., 149.

§ 4. **Application is Made a Warranty.**—By the terms of the policy introduced in evidence, the written application is made a part of the contract of insurance; the effect of this clause is to make the application part of the policy as effectually as if it was embodied in the policy itself.

One of the conditions in the policy is that any false representation made by the assured, of the condition of the property, or of its occupancy, or of any fact material to the risk, will avoid the policy; and so the court instructs you, as a matter of law, that any matter material to the risk, if contained in the application, and if it was untrue, in fact, will avoid the policy, whether it was made intentionally or not (unless you find, from the evidence, that the company is estopped by the conduct of its agent from setting up such matters in defense as explained in these instructions). *Jennings vs. Chenango County Mut. Ins. Co.*, 2 Denio, 75.

§ 5. **Warranty as to Amount of Incumbrance.**—The jury are

instructed, that among the questions in the applications of insurance, which the insured is required to answer, was this: Is the property incumbered, if so, to what amount? To which the plaintiff answered: Yes, mortgaged, \$1,000. Now, the court instructs the jury, as a matter of law, that the amount of incumbrance on the property insured at that time was material to the risk, and if you believe, from the evidence, that the property was then incumbered to the amount of, etc., then this would be such a false representation as would avoid the policy, and in such case it would make no difference whether the untrue answer was made by accident, mistake or design. Unless the jury further believe, from the evidence, that (here set out the matter claimed as an estoppel). *Byers vs. Ins. Co.*, 35 Ohio, St., 606.

You are instructed that by the terms of the policy introduced in evidence, the insured warrants the truth of all the material statements contained in his application for insurance, and among the matters so warranted by the plaintiff is the statement that the incumbrances on the property insured only amounted at that time to the sum of (\$1,000). This was a representation of a then existing fact respecting the property insured, which was material to the risk, and if it was not substantially true, this would render the policy void. If, therefore, you believe from the evidence, that at the time of the making of the said application there was other incumbrance on said premises over and above the said (\$1,000) to the amount of, etc., and that this was not called to the attention of the agent who took the application and that he had no notice or knowledge of such other incumbrance, this would render the policy void, and the plaintiff cannot recover in this suit. *Schumitsch vs. Am. Ins. Co.*, 48 Wis., 26; *Ryan vs. Springfield Ins. Co.*, 46 Wis., 671.

Although you may find, from the evidence, that there was other incumbrance on the property over and above the (\$1,000) mentioned in the application for insurance, still, if you further believe, from the evidence, that all the facts and circumstances connected with such other incumbrance were called to the attention of the agent who took said application, and that he advised the plaintiff that, in view of such circumstances, it would be unnecessary to mention such other incumbrance,

and that it was in consequence of such advice that such addition and incumbrance was omitted in the application, then the defendant is estopped from urging such omission as a defense to this action, and as to that question, you should find in favor of the plaintiff. *Rockford Ins. Co. vs. Nelson*, 75 Ill., 548; *Harriman vs. Queen's Ins. Co.*, 49 Wis., 71.

§ 6. **Fraud—Knowledge of Agent Knowledge of the Company.**—If the jury believe, from the evidence, that the application for insurance was filled out or drawn up by the agent of the defendant and that the insured honestly, frankly and fully disclosed to such agent the real facts in regard to, etc., and that the insured was induced to take out the policy and pay the premium by the assurances of such agent that the form in which the facts in regard to, etc., were stated in the application was the correct one, then the defendant is estopped from claiming any advantage from any misstatement in the said application in regard to, etc., if the same has been proved. *Lasher vs. N. W. National Ins. Co.*, 55 How. (N. Y.), Pr. 318; *Manhattan F. Ins. Co. vs. Weill*, 28 Gratt., 389; *McCall vs. Phoenix, etc.*, 9 W. Va., 237; *Home Ins. Co. vs. Lewis*, 48 Tex., 622.

If you believe, from the evidence, that the plaintiff included in the policy goods not belonging to him with intent to defraud the insurance company and purposely concealed who was the true owner, or represented them to be his property, with intent to cheat and defraud the company, then this would render the policy void.

But if you believe, from the evidence, that at the time the application for insurance was made he stated to the agent who took the application that these goods were in his possession but that he was not the owner of them, and that the agent then informed him that he could include them in the insurance as his goods and that the plaintiff acted on this information and relied on this advice, then the plaintiff cannot be said to have intended to defraud the company.

If you believe, from the evidence, that at the time the application was made the plaintiff could not readily write or read writing and that the blanks in the printed forms of application were filled up by one A. B. and that he was then

acting as the agent of the insurance company, and further that there were false answers and statements therein, still if you further believe from the evidence that such false answers and statements were occasioned by the carelessness, mistake or inadvertence of such agent, then the plaintiff would not be bound by such false statements—although the policy contains a clause that the person who procures the insurance should be deemed to be the agent of the assured, etc. *Sprague vs. Holland Purchase Ins. Co.*, 69 N. Y., 128.

§ 7. **Condition as to Other Insurance.**—That among the conditions in the policy sued on, is one which provides: that if the assured should thereafter procure any other insurance, etc.; and the court instructs you, that if you find, from the evidence, that the plaintiff, after receiving the policy from the defendant company, and before the loss in question occurred, obtained other insurance upon the property, which had not expired at the time of the fire, and that no notice thereof was given to the defendant, its agents or officers, before the fire, or to which the company or its agents did not consent. then this would render the plaintiff's policy void, and he cannot recover in this suit. *Am. Ins. Co. vs. Gallatin*, 48 Wis., 36; *Mellen vs. Hamilton Fire Ins. Co.*, 17 N. Y., 609; *Burt vs. People's Mutual F. Ins. Co.*, 2 Gray, 397; *Shurtliff vs. Phoenix Ins. Co.*, 57 Me., 137; *New York Cent. Ins. Co. vs. Watson*, 23 Mich., 486; *Lockey vs. Georgia Home Ins. Co.*, 42 Ga., 456; *Jewett vs. Home Ins. Co.*, 29 Ia., 562.

Although you may believe, from the evidence, that after receiving the policy from defendant the plaintiff did procure other insurance on the property in question (without having the consent of the secretary written on the policy), still, if you further believe, from the evidence, under the instructions of the court, that A. B. was at the time the general local agent at S., and had authority to receive and take applications for insurance by defendants, and to make contracts for the company in relation thereto—and further, that while the said A. B. was so acting as agent, the plaintiff notified him of his intention to take such additional insurance, and afterwards told him he had done so, and that neither the said agent, nor any one else on behalf of defendant, notified the plaintiff that such additional

insurance, without being indorsed on the policy (or consented to in writing by the secretary), would render or had rendered the policy void, then the defendant must be deemed to have waived the condition in the policy regarding such additional insurance, and the plaintiff's right of recovery will not be affected thereby. *Am. Ins. Co. vs. Gallatin*, 48 Wis., 36; *Geib vs. International Ins. Co.*, 1 Dill. Cir. Ct., 443; *Goodall vs. New England Mutual F. Ins. Co.*, 25 N. H., 169; *Ins. Co. of N. Am. vs. McDowell*, 50 Ill., 120; *Schenck vs. Mercer County Mutual Ins. Co.*, 24 N. J., 447; *Hayward vs. N. Ins. Co.*, 52 Mo., 181. *Contra: Worcester Bank vs. Hartford F. Ins. Co.*, 11 Cush., 265.

If you believe, from the evidence, that A. B. was the agent of the defendant at S. for taking applications for insurance, and for delivering policies for the defendant company, and that he was notified by the plaintiff of the additional insurance placed on plaintiff's property and that he did not object to the same or suggest any breach of the condition of the original policy in consequence thereof, then the defendant is estopped from now setting up such additional insurance in avoidance of its policy.

Although you may believe, from the evidence, that the plaintiff, after receiving the policy from the defendant, and before the loss in question, did obtain other insurance upon the property to which the company did not consent and of which they had no notice until after the fire, still, if you further believe, from the evidence, that the adjusting agent of the company, with full knowledge of all the facts relating to such additional insurance, told the plaintiff to go on and make up his proofs of loss without giving the plaintiff to understand that the company would rely upon a forfeiture by reason of the additional insurance, and that the plaintiff did thereupon go to the expense and trouble of making up such proofs of loss and forwarding them to the company, this would amount to a waiver of such forfeiture, and the company now cannot claim the forfeiture for the purpose of avoiding its liability on its policy. *Penn Ins. Co. vs. Kittle*, 39 Mich., 51.

You are instructed that if you believe, from the evidence, that at the time of the making of the policy sued on, the assured had other insurance on the same premises without the

consent of the defendant company written on the policy in question in this case, and that such other insurance was still subsisting at the time of the fire, then these facts rendered the defendant's policy void and the jury should find for the defendant.

§ 8. **Other Insurance Known to the Defendant.**—Although the jury may believe, from the evidence, that the plaintiff had other insurance on the property in question not indorsed upon the policy, still, if the jury further believe, from the evidence, that the existence of such other insurance was known to the defendant when its policy was issued, then these facts would amount to a waiver of the condition requiring additional insurance to be indorsed on the policy or consented to by the defendant in writing. *Richardson vs. Westchester F. Ins. Co.*, 15 Hun, 472; *Carr vs. Hibernia F. Ins. Co.*, 2 Mo. App., 466; *Goodall vs. New England Mutual F. Ins. Co.*, 25 N. H., 169; *Ins. Co. of N. Am. vs. McDowell*, 50 Ill., 120.

§ 9. **Representations as to Incendiarism.**—Among the questions propounded to the insured, in the application for insurance, was this: Incendiarism—have you any reason to believe your property is in danger from it? and the answer is, No. And the court instructs the jury, as a matter of law, that that question and answer related to a matter which was material to the risk, and if you believe, from the evidence, that at the time that application was made and the policy sued on in this case issued, the plaintiff knew that an attempt had then recently been made to burn the premises insured, and that he failed to disclose that fact to the defendant's agent who took the application and delivered the policy, then these facts would render the policy void, and the jury should find for the defendant. *North Am. Fire Ins. Co. vs. Throop*, 22 Mich., 146.

If you believe, from the evidence, that a written application for insurance was made by the plaintiff to the defendant, and that the policy sued on in this case was issued upon that application, and also that the plaintiff stated in that application that he had no reason to fear that his property was in danger from incendiarism, and if you further believe, from the evidence, that, as a matter of fact, he then had such reason to fear, then your verdict should be for the defendant.

Although you may believe, from the evidence, that there had once been an attempt made to burn the premises insured, still, if you further believe, from the evidence, that this was so long a time before the application was made that the plaintiff did not then fear, and had no reasonable ground to believe that his property was in danger from incendiaries, then a failure to disclose such attempt to burn the property would not render the policy void. *North Am. Fire Ins. Co. vs. Throop*, 22 Mich., 146.

Although you may believe, from the evidence, that there had once been an attempt to burn the premises insured, still, if you further believe, from the evidence, that at the time the application was made the plaintiff explained to the agent who took the application, the facts and circumstances connected with such attempt, and that the agent told him that it would not be necessary to mention it in the application, etc., and that for that reason the plaintiff answered, as he did, the inquiry in relation to incendiaries, then such question and answer or the failure to disclose or mention such attempt in the application would not render the policy void. *North Am. Ins. Co. vs. Throop*, 22 Mich., 146; *Am. Ins. Co. vs. Gilbert*, 27 Mich., 429.

§ 10. **Warranty as to Title.**—The policy of insurance in this case refers to the written application of the plaintiff and makes it a warranty of all the matter of facts therein stated. The application contains these questions and answers: Title—is your title to and interest in this property absolute? If not, state its amount, and give the name, interest and amount of others concerned; answer, Yes. The court instructs the jury that the legal effect of the policy and of these questions and answers is that they amount to a warranty that the plaintiff was the sole and absolute owner of the property. While the deeds and title papers introduced in evidence show that the title to an undivided half of the property was in one A. B. at the time, and your verdict, therefore, must be for the defendant, unless, etc. *Etna Ins. Co. vs. Resh*, 40 Mich., 241.

§ 11. **Non-Compliance with Conditions.**—Among the conditions of this policy is this: ("If the interest of the assured in

the property be other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise this policy shall be void ;”) and the court instructs you, that if you believe, from the evidence, that the plaintiff was not the sole and absolute owner of the property insured, holding the same for his own use and benefit at the time he made the application for insurance and he did not notify the agent of the company of that fact, then this would render the policy void, and the plaintiff cannot recover, unless the jury further believe, from the evidence, that the agent of the company knew the facts in relation to the ownership of the property or had knowledge of such facts as ought to have put a reasonably prudent and careful man upon inquiry with reference thereto. *Smith vs. Commonwealth Ins. Co.*, 49 Wis., 322.

If you believe, from the evidence, that the agent who issued the policy in question, was previously informed of the circumstances under which the plaintiff held the title to the property, and was furnished with full information which would have enabled him, by inquiry, to learn the facts in regard to plaintiff's title, and that the agent, with such knowledge, issued the policy without specifying in the policy the character of the plaintiff's title, this was a waiver of the condition in the policy in reference thereto. *Ibid.*

§ 12. **Furnishing Proofs of Loss.**—The jury are instructed, that the policy in this case provides that the assured shall, after a loss by fire, forthwith give notice of such loss to the insurer, and as soon thereafter as possible, render to the company a particular account of the loss, signed and sworn to by him, stating, among other things, how the fire originated, etc.; this particular account and certificate of the officer are what are understood as “proofs of loss;” the meaning of this language is that the assured shall, as soon after the fire as he reasonably can under all the circumstances of the case, give notice to the company of the loss and furnish to the company such proofs of loss; that is, he shall not be guilty of any unnecessary delay in giving such notice or in furnishing such proofs. *Columbia Ins. Co. vs. Lawrence*, 2 Peters, 25; *Hodgkins vs.*

Montgomery, etc., Ins. Co., 34 Barb., 213; *McCarm vs. Aetna Ins. Co.*, 3 Neb., 198; *Niagara District Ins. Co. vs. Lewis*, 12 U. C. C. P., 123.

"The court instructs the jury, that if you believe, from the evidence, that William Grunert, the insured, was, at the time of the fire (September 8, 1880,) absent from his home in Winchester, Illinois, and could not be found, so as to make proofs of the loss within the time specified by the policy, then in that case, such proofs of loss could be made by the agent of the said William Grunert." Wood on Fire Ins., p. 693, § 413; *Ayres vs. Hartford Ins. Co.*, 17 Iowa, 176; *Farmers' Mutual Ins. Co. vs. Grayville*, 74 Pa. St., 17; *O'Connor vs. Hartford Fire Ins. Co.*, 31 Wis., 160; *Northwestern Ins. Co. vs. Adkinson*, 3 Bush (Ky.), 328; *Sims vs. State Ins. Co.*, 47 Mo., 54; *Ger. F. Ins. Co. vs. Grunert*, 112 Ill., 69.

You are instructed, that in this case, the policy provides, among other things, that the loss shall not be payable, until the expiration of (sixty days) after the proofs of loss have been furnished, etc. And these proofs of loss are required to be, etc., (following the policy). And if the jury believe, from the evidence, that such proofs of loss had not been furnished to the company at least (sixty days) before the commencement of this suit, then the jury should find for the defendant, unless the jury further believe, from the evidence, that the production of such proofs of loss was in some manner waived or excused by the defendant, as explained in these instructions *Hamman vs. The Queen Ins. Co.*, 49 Wis., 71.

The policy of insurance sued on in this case, provides that (set out the provisions relating to furnishing proofs of loss and forfeiture) this time and condition having been fixed by the parties, they are bound by it, and if you believe, by the evidence, that the plaintiff did not, within, etc., then he has forfeited his right to recover in this suit, and you should find for the defendant, unless you further believe, from the evidence, that the defendant has in some way waived or excused the necessity for furnishing such proofs of loss, as explained in these instructions. *Aurora F. & M. Ins. Co. vs. Kranich*, 36 Mich., 289.

If you believe, from the evidence, that the plaintiff gave to the defendant, or to its authorized agents, notice and proofs

of the alleged loss more than sixty days before the bringing of this suit, and that, under all the circumstances appearing in evidence, he did so within a reasonable time after the alleged loss, and without unnecessary or unreasonable delay, then the defendant cannot defeat the plaintiff's right of recovery on the ground of alleged delay in giving notice or making proofs of the loss, provided you believe, from the evidence, under the instruction of the court, that the plaintiff is otherwise entitled to recover.

If you believe, from the evidence, that the plaintiff did not, within a reasonable time, and as soon as it could conveniently be done, after the alleged loss, serve notice of the loss upon the defendant company or its agents, and that he was not delayed in serving such notice by any act or statement of the defendant company or its agents, then you should find for the defendant.

§ 13. **Waiving Proofs of Loss.**—If the jury believe, from the evidence, that the plaintiff within, etc., furnished to the defendant what purported to be proofs of loss, though not in exact conformity with the terms of the policy, and that these proofs were accepted by the company without objection or without suggesting that they did not conform to the terms of the policy and objecting to them for that reason, then the defendant is estopped from claiming that such proofs were insufficient. *Hamman vs. The Queen Ins. Co.*, 49 Wis., 71; *Kennedy vs. Home Ins. Co.*, 71 N. Y., 396; *Spratley vs. Hartford Ins. Co.*, 1 Dill. Cir. Ct., 392; *Patterson vs. Triumph Ins. Co.*, 64 Me., 500; *St. Louis Ins. Co. vs. Kayle*, 11 Mo., 278.

If you believe, from the evidence, that the plaintiff furnished to the defendant within, etc., what purported to be proofs of loss, though not in exact conformity to the requirements of the policy, and that they were objected to upon that ground, still, if you further believe, from the evidence, that the defendant then denied any liability to the plaintiff under said policy, and declared that the company would pay no alleged claim thereunder, then such declarations amounted to a waiver of any further proof of loss, and the plaintiff was under no obligation to furnish any others. *Hamman vs. The Queen Ins. Co.*, 49 Wis., 71; *Bennett vs. Maryland Ins. Co.*,

14 Blatchf., 422; *Rogers vs. Traders' Ins. Co.*, 6 Paige Ch., 583; *Phillips vs. Protection Ins. Co.*, 44 Mo., 220.

You are instructed, that the provision in the policy in relation to the time of furnishing the proofs of loss is inserted for the benefit of the company and if the company chooses to waive it, it can do so.

Mere silence in regard to the furnishing of such proofs is not to be taken as a waiver of the right of the company to insist on a strict compliance with the terms of the contract. In order to amount to a waiver, etc., you must find, from the evidence, that there was either an express agreement between the parties to that effect or else that there was such a course of conduct on the part of the defendant as was reasonably calculated to throw the insured off his guard and lead him to believe that the company did not require such proofs.

And in this case, if you believe, from the evidence, that the agent of the company said to the plaintiff after the company had notice of the loss and had inquired into the circumstances attending it, that they would not pay any claim under that policy for the reason (because the building was not occupied at the time of the fire) this would amount to a waiver of the necessity of furnishing proofs of loss. *Aurora F. & M. Ins. Co. vs. Kranich*, 36 Mich., 289; *Keenan vs. Mo. St. Mutual Ins. Co.*, 12 Ia., 126.

You are instructed that in order to effect a waiver of the condition in the policy regarding, etc., you must believe, from the evidence, that the officers or agents of the company either said or did something reasonably calculated to mislead the plaintiff or throw him off his guard in respect to, etc.; mere silence is not enough from which to infer a waiver of this condition of the policy. And in this case, if you believe, from the evidence, etc., this would not amount to a waiver of the condition in the policy. *Muller vs. S. S. F. Ins. Co.*, 87 Penn. St., 399; *McDermott vs. Lycoming Ins. Co.*, 44 N. Y. S. Ct., 221.

The jury are instructed, that an insurance company may waive, not only imperfections and deficiencies in the statement of loss and proofs required by the policy, but it may also waive a prompt compliance with the provisions of the policy as to the time of giving notice and presenting proofs of loss. And if

the jury believe, from the evidence, that the plaintiff, before the expiration of a reasonable time for furnishing proofs of loss after the fire, went to an agent of the company and requested time for furnishing such proofs, and was then told by the agent that the question of title was the only question so far as the company was concerned, and that he might take his own time to prepare and furnish proofs, to furnish them at his convenience, and plaintiff, relying upon such statements, neglected to prepare the proofs as soon as he might otherwise have done, but did, afterwards, at his convenience and more than sixty days prior to the bringing of this suit, furnish to the company proofs of loss, then the company are estopped from objecting that the proofs were not furnished in proper time. *Underwood vs. Farmers' Joint Stock Ins. Co.*, 57 N. Y., 500; *Dohn vs. Farmers' Joint Stock Ins. Co.*, 5 Lans., 275.

§ 14. **Condition to Render Account of Loss Forthwith.**—Policy containing this provision: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and, as soon thereafter as possible, render a particular account of such loss," etc.

§ 15. **When Agent Cannot Waive Proofs of Loss.**—The jury are instructed that the defendant company cannot be affected by any statement which their agents at C. may have made to the plaintiff upon the subject of his serving upon the company notice of loss or proofs of loss, as required by the policy, if the jury believe, from the evidence, that such statements were made after the plaintiff had had a reasonable time after the fire within which to have given such notice or to have made such proofs, and he had not done so.

And if you believe, from the evidence, that the plaintiff did not within a reasonable time and without unnecessary delay prepare and serve upon the company the proofs of loss referred to and explained in these instructions upon that point, then you should find the issues for the defendant, unless you further believe, from the evidence, that prior to the expiration of a reasonable time after the fire for delivering such proofs of loss, consent was given by the agents of the company that the time for presenting such proofs of loss might be extended.

§ 16. **Premises Becoming Unoccupied.**—The jury are instructed that the policy of insurance in this case provides that, if the premises insured become unoccupied and so remain for thirty days without the assent of the company indorsed thereon, then the policy should become void. And if the jury believe, from the evidence, that, at the time of the fire, the premises were unoccupied, and that they had been so unoccupied for thirty days, or more, before the fire, without the consent of the company, then the policy had become void, and the jury should find for the defendant.

In determining, under the evidence, whether the premises became unoccupied and so remained for thirty days or more, at and before the loss, you are instructed, as a matter of law, that when the property insured is a dwelling house, the occupancy required under such a policy as this, is such occupancy as ordinarily attends a dwelling house; the word "unoccupied" in the policy is to be construed in its ordinary and popular sense; and if you believe, from the evidence, that after the making of the policy, the insured with his family removed from the house and ceased to occupy the same as a dwelling house until the loss, and that this had continued for thirty days or more before the fire, then the policy became void, and you should find for the defendant. *Western Assurance Co. vs. Mason*, 5 Brad., 141; *Whitney vs. Black River Ins. Co.*, 72 N. Y., 117.

One of the representations made by the plaintiff in the application upon which the policy was issued was this (set out the representation as to occupancy) and the policy provides among other things that (set out the condition as to the premises becoming vacant). Now, if you believe, from the evidence, that at the time of the fire the premises were vacant, and that the defendant and its officers and agents had had no knowledge or notice of this fact, then the plaintiff cannot recover. *Aurora F. & M. Ins. Co. vs. Kranich*, 36 Mich., 289; *Gans vs. St. Paul F. Ins. Co.*, 43 Wis., 108.

If you believe, from the evidence, that the premises, etc., were unoccupied at the time the policy was issued, and that the agent of the company who took the application and issued the policy knew this fact, then the fact, if proved, that the premises were unoccupied at the time of the fire will con-

stitute no defense to this action. *Aurora F. & M. Ins. Co. vs. Kranich*, 36 Mich., 289; *Ætna Ins. Co. vs. Meyers*, 63 Ind., 238.

§ 17. **Premises Temporarily Vacant.**—Although the jury may believe, from the evidence, that the house was vacant and unoccupied at the time of the fire, still, if the jury further believe, from the evidence, that such vacancy was but temporary, and was occasioned by the fact that one tenant had but a day or two before moved out to enable another tenant to move in, and that such new tenant had engaged to move, and was about to do so when the fire occurred, this would not render the premises vacant and unoccupied within the meaning of the policy of insurance. *Whitney vs. Black River Ins. Co.*, 72 N. Y., 117; *Cummins vs. Agricultural Ins. Co.*, 67 N. Y., 260.

§ 18. **False Swearing in Proofs of Loss, etc.**—In regard to the sworn statement of plaintiff in his proof of loss that (he was the owner in fee simple of the premises, etc.) the court instructs you that although you may believe, from the evidence, that the plaintiff at the time was occupying the premises under a lease, these facts alone would not constitute a defense to this action. In order to create a defense under the condition of the policy in relation to false swearing, it must appear, from the evidence, that the plaintiff not only swore falsely, but that he did so willfully and knowingly and with the intention of deceiving the officers of the company. *Dogge vs. Nat. Ins. Co.*, 49 Wis., 501; *Ins. Co. vs. Mides*, 14 Wallace, 375; *Franklin Ins. Co. vs. Culver*, 6 Ind., 137; *Planters' Mut. Ins. Co. vs. Deford et al.*, 38 Md., 328; *Little vs. Phoenix Ins. Co.*, 123 Mass., 380; *Parker vs. Amazon Ins. Co.*, 34 Wis., 363; *Marion vs. Great Republic Ins. Co.*, 35 Mo., 148; *Franklin F. Ins. Co. vs. Updegraff*, 43 Penn. St., 350.

Although you may believe, from the evidence, that the plaintiff was not the owner of the premises insured, but was only occupying the same under a lease at the time of the loss, still, if you further believe, from the evidence, that the plaintiff, when he swore to his proofs of loss, owing to his ignorance of the English language, or of the meaning of the words "owner in fee simple" innocently and unwillingly, and

without any intention to deceive, swore falsely regarding his interest in the property, this would not of itself prevent a recovery in this case.

If you believe, from the evidence, that the plaintiff included in his proofs of loss, which he furnished to the company, articles of property which did not belong to him, knowingly and with intent to defraud the company, knowing that he had no right so to do, this would avoid the policy, and the plaintiff cannot recover in this suit. *Farmers' Mutual F. Ins. Co. vs. Garrett*, 42 Mich., 289; *Geib vs. International Ins. Co.*, 1 Dill. Cir. Ct., 443.

CHAPTER XXV.

INTOXICATING LIQUORS.

- SEC. 1. Suit by wife—Statutory provisions.
2. What must be proved.
 3. Defendant's jointly and severally liable.
 4. Sufficient if the liquor sold contributed to, etc.
 5. Owners of premises.
 6. Suit against saloon-keeper and owner of building, jointly.
 7. Propriety of the law not a question for the jury.
 8. Burden of proof—What must be proved.
 9. Proximate cause, what.
 10. New or intervening cause.
 11. Preponderance of the evidence sufficient.
 12. Good faith not a mitigation of damages, when.
 13. The verdict must be founded on evidence.

NOTE.—The statutes of the different states, giving a right of action for injuries sustained in consequence of the intoxication of any person, vary somewhat in their details, although they are similar in their general features. The following instructions, adapted to this class of cases, with slight changes, will generally be found applicable to the laws of most of the different states.

§ 1. Suit by a Wife—Statutory Provisions.—The jury are instructed, that by the law of this state, every person who sells or gives intoxicating liquors to another, and thereby, in whole or in part, causes the intoxication of such person, is liable to the wife of the person so becoming intoxicated, for any injury which she may sustain in her means of support, resulting from the death of her husband, if his death ensues as a consequence of such intoxication. *O'Halloran vs. Kingston*, 16 Ill. App., 659.

The statute of this state provides that every wife, who shall be injured in person or property, or means of support in consequence of the intoxication, habitual or otherwise, of her husband, may have a right of action in her own name against any persons who shall, by selling or giving intoxi-

rating liquors to her husband, have caused such intoxication in whole or in part.

§ 2. **What Must be Proved.**—The jury are instructed, that if they believe, from the evidence, that the plaintiff was the wife, and is now the widow of the said F. M., and that the said defendants, or any or either of them, or the servants, employes or any person acting for said defendants, or any or either of them, did on or about — sell or give to the said F. M. beer, or any intoxicating liquor, and thereby, in whole or in part, cause the intoxication of the said M., and that the said M., while under the influence of such intoxication, and in consequence thereof, lost his life in manner and form as charged in the declaration, and that the plaintiff was thereby damaged in her means of support, then the jury should find the said defendants, or such of them as are proved to have contributed to such intoxication, in whole or in part, guilty, and assess the plaintiff's damages. *Fountain vs. Draper*, 49 Ind., 441; *Emory vs. Addis*, 71 Ill., 273; *Woolheather vs. Risley*, 38 Ia., 486; *Worley vs. Spurgeon*, 48 Ia., 465; *Kehrig vs. Peters*, 41 Mich., 475; *Flynn vs. Fogerty*, 106 Ill., 263.

§ 3. **Defendants Jointly and Severally Liable.**—The jury are further instructed, that in actions of this kind, it is not necessary to make all persons who have been guilty of selling intoxicating liquors to the deceased, defendants in a suit for damages, if any, resulting from intoxication, caused by their joint act and sales, but the person injured may sue any one or more of the persons, who, by themselves, their agents or employes, made such sale, and recover from him or them, if found guilty, the damages sustained.

§ 4. **Sufficient if the Liquor Sold Contributed, etc.**—The jury are further instructed that though they may believe, from the evidence, that the deceased had liquor in his house, or about his person, or had bought or taken it at places other than at the saloon of the defendants, still, this fact would constitute no defense to this action; provided the jury believe, from the evidence, that the deceased obtained intoxicating liquors at

the saloons of the defendant, which contributed to his intoxication, and that his death resulted as a consequence of such intoxication. *Roth vs. Eppy*, 80 Ill., 233; *Boyd vs. Watt*, 27 Ohio St., 259; *Woolheather vs. Risley*, 38 Ia., 486.

In order to make a dram-shop keeper liable for injuries occasioned by intoxication, which results from the drinking of intoxicating liquors sold by him, it is not necessary that such intoxication should be wholly produced by liquor sold by him; it is only necessary to show that the liquor sold by him contributed or assisted in producing such intoxication. *O'Halloran vs. Kingston*, 16 Ill. App., 659.

Even though the jury believe, from the evidence, that the intoxication complained of resulted in part from liquors drank by the said B. before he went to the saloon of the defendant, still that fact affords no defense in this case, if the jury further believe, from the evidence, that the defendant sold intoxicating liquors to deceased, and that the intoxicating liquors so sold by defendant contributed or assisted to produce such intoxication, and that deceased died in consequence of such intoxication.

§ 5. **Owner of the Premises, etc.**—The jury are instructed, that under our statute, the owner of premises upon which intoxicating liquors are kept for sale, contrary to law, is not guilty of an offense if he, in good faith, leased them for a lawful purpose, and did not afterwards affirmatively assent to such unlawful use; the mere failure to prevent, or to attempt to prevent, the illegal use or sale of the liquors, does not subject him to the penalties of the statute. *State vs. Ballingall*, 42 Ia., 87.

§ 6. **Suit against the Saloon-Keeper and Owner of the Building Jointly.**—The court instructs the jury, that the law under which this suit is brought, provides that every wife, who shall be injured in person or property, or means of support, in consequence of the intoxication, habitual or otherwise, of her husband, may have a right of action, in her own name, against any person or persons who shall, by selling or giving intoxicating liquor to her husband, have caused such intoxication, in whole or in part; and the law further provides, that any per-

son owning any building or premises where such liquors are sold, knowing that intoxicating liquors are sold therein, and knowingly permitting such sale, shall be liable jointly with the person or persons selling or giving such intoxicating liquors, for all damages which may be sustained in the manner above stated. *Loan vs. Hiney*, 53 Ia., 89.

The jury are further instructed, that if they find, from the evidence, that the defendant, H. H., is guilty, as charged in the declaration, and if they further find, from the evidence, that the other defendant, S. H., was the owner of the building or premises where the liquors were sold or given to the deceased, and that he then knew that the said defendant, H. H., was keeping a saloon on said premises, and selling intoxicating liquors therein, and knowingly permitted such sales, then the jury will find both the defendants guilty, and assess the damages equally against both, if any damages have been proved.

§ 7. **Propriety of the Law not a Question for the Jury.**—The court instructs the jury, that it is not for them, in this case, to inquire into or consider the propriety of the law now in force, relating to the sale of intoxicating liquors, under which this action is brought. The law, as it stands upon the statute book of this state, should be enforced; and if the jury believe, from the evidence in this case, that the defendants, or any or either of them, contributed to the intoxication of plaintiff's husband, if such intoxication has been proved, and that in consequence of such intoxication, her husband died, as alleged in plaintiff's declaration, and that the plaintiff has been injured, in her means of support, by reason of such death, then the jury should find for the plaintiff, as against such of the defendants as have been proved to have contributed to such intoxication, in whole or in part.

§ 8. **Burden of Proof—What Must be Proved.**—The court instructs the jury, that to entitle the plaintiff to recover, it must be proved, by a preponderance of evidence, that the defendants, or one of them, sold intoxicating liquors to the deceased, and thereby contributed to cause his intoxication, in whole or in part, and that his death resulted as a consequence of such intoxication.

To entitle the plaintiff to recover in this suit, it is not enough for her to show that she has been injured in her means of support, by the death of her husband; it must further appear, from the evidence, that such death was caused by, or was in consequence of, his intoxication, and that defendants, or one of them, sold, or gave him intoxicating liquors, which produced such intoxication, in whole or in part; and each of these particulars must be proved by a preponderance of the evidence.

To entitle the plaintiff to recover in this suit, it is not enough that the jury may believe, from the evidence, that the defendants, or one of them, sold beer to the deceased, which contributed to cause his intoxication, in whole or in part; it must further appear that the intoxication was the immediate or proximate cause of his death, and not merely that it was the remote cause or occasion of his death.

The court instructs the jury, that to entitle the plaintiff to recover against any one or more of the defendants, the jury must believe, from the evidence, that such defendants sold or gave intoxicating liquors to the deceased, and thereby caused or contributed to cause, his intoxication, in whole or in part; and so far as the injury complained of results from the death of the deceased, it must appear that the death was caused by such intoxication. *Kratch et al. vs. Heilman*, 53 Ind., 517; *Flyn vs. Fogarty*, 106 Ill., 263.

§ 9. Proximate Cause, What.—In determining whether an act is the proximate cause of an injury, the legal test is: Was the injury of such a character as might reasonably have been foreseen or expected, as the natural result of the act complained of? A party is not, in law, chargeable with results which do not naturally and reasonably follow as the consequences of his conduct.

In determining whether the intoxication was the immediate or proximate cause of the death of the deceased, the jury should consider whether the causes, which actually produced his death, were such as naturally resulted as a consequence of the intoxication, and of such kind as might have been reasonably anticipated by a reasonable person. If they were not such, then the intoxication cannot, in law, be regarded as the

immediate and proximate cause of his death, and the defendants are responsible therefor.

If the jury believe, from the evidence, that the immediate and proximate cause of the death of the deceased was either apoplexy, heart disease or sunstroke, then the plaintiff cannot recover in this case, unless the jury further believe, from the evidence, that such disease was caused by, or was the natural and proximate result of the intoxication of the deceased, and that such intoxication was caused, in whole or in part, by the intoxicating liquors furnished by the defendants, or one of them; and further, that such a result of the sale of the intoxicating liquors might have been reasonably foreseen or anticipated by the defendants, at the time such liquors were sold.

As a matter of law, damages, to be recoverable, must be the natural and reasonable result of the defendant's act; and if of such a character as in the ordinary course of things would flow from the act, they may be recovered, otherwise they are too remote. A party cannot be held responsible for injuries which could not reasonably have been foreseen or expected, as the result of his misconduct. *Phillips vs. Dickerson*, 85 Ill., 11; *Shugart vs. Egan*, 83 Ill., 56; *Schroeder vs. Crawford*, 94 Ill., 357; *Hart vs. Duddleson*, 20 Ill. App., 619.

An act is the proximate cause of an event only when, in the natural course of things and under the particular circumstances surrounding it, such an act would naturally produce the event, and in order to create legal liability for damages, the injury must be such as a man of ordinary experience and sagacity could foresee might probably ensue from said act.

The court instructs the jury, that to entitle the plaintiff to recover in this case, the damages claimed must be the direct consequences of the act complained of. The relation of cause and effect must be shown to exist between the act complained of and the injury; and this relation of cause and effect cannot be made out by including the illegal acts of a third person.

§ 10. **New or Intervening Cause.**—The court instructs the jury, as a matter of law, that while a man is answerable for the natural and probable consequences of his own acts, still, if his act happens to concur with something extraordinary, and not reasonably to have been foreseen, and thus produce an injury, he will not be liable therefor; provided, such extraor-

dinary and unforeseen condition was not produced by, or was not the direct result of, his own wrongful act.

If the death of a party, who receives a wound while intoxicated, can be traced as the natural and probable result of any new and intervening cause, such as reckless exposure of himself, or amputation of the wounded limb, where an amputation was not necessary, the liquor seller will not be responsible to the wife for the death.

The damages to be recovered in an action must always be the natural and proximate consequence of the wrongful act complained of. If a new force or power has intervened, of itself sufficient to stand as the cause of the mischief or injury, the first must be considered as too remote. *Schmidt vs. Mitchell*, 84 Ill., 195.

§ '11. **Preponderance of Evidence Sufficient.**—The jury are further instructed, that in civil actions of this kind, it is not necessary that the fact of the sale of intoxicating liquors, or any other fact necessary to a recovery, should be proved beyond a reasonable doubt; it is only necessary that the facts should be proved to the satisfaction of the jury by a preponderance of the evidence. *Mayers vs. Smith*, 13 N. E. Rep., 219.

§ 12. **Good Faith not a Mitigation. When.**—The jury are instructed, that although they may believe, from the evidence, that any or either of the defendants, in good faith, instructed his bar-keeper not to sell liquor to the deceased, still, this fact cannot be considered by the jury in mitigation of the actual damages sustained by the plaintiff, if any such have been proved, in case you find such defendant or defendants guilty.

If the jury believe, from the evidence, that the deceased died, from the effect of what is known as (*sunstroke*), and that that disease was, in a measure, caused by the habitual intoxication of the deceased, for a considerable time before his death, still, the defendants would not be liable for causing his death, unless the plaintiff has proved, by a preponderance of evidence, that the defendants, or one of them, furnished the deceased with liquors, which caused such habitual intoxication, in whole or in part.

§ 13. **Verdict Must be Founded on the Evidence.**—In determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before them; the jury have no right to indulge in speculations or conjectures, not supported by the evidence.

CHAPTER XXVI.

LANDLORD AND TENANT.

- Sec. 1. Relation of landlord and tenant must exist.
2. Occupant liable for rent, when—Illinois.
3. Lease not modified or surrendered—Suit for rent.
4. Surrender of premises, how effected.
5. Surrender must be assented to by landlord.
6. Eviction stops the rent.
7. Eviction from a part of the premises.
8. Forcible expulsion not necessary.
9. Acts of trespass, not eviction.
10. What is an eviction.
11. Landlord's lien for rent, by statute.
12. Levy of distress warrant not necessary to perfect lien.
13. Lien against purchaser from tenant, when.
14. Tenant holding over, contract implied.
15. New contract implied, when.
16. Contract not implied from holding over, when.
17. Wrongful holding over—Illinois.
18. Tenant cannot deny landlord's title.
19. Landlord not bound to repair.
20. Title to crops.
21. Tenant's right to remove fixtures.

§ 1. **Relation of Landlord and Tenant Must Exist.**—The jury are instructed, that this is a suit brought by the plaintiff to recover rent for the use and occupation by the defendant of the premises in question, and to entitle the plaintiff to recover the jury must believe, from the evidence, not only that the defendant occupied the premises, as alleged, but that he occupied them as the tenant of the plaintiff.

Although the jury may believe, from the evidence, that the plaintiff was the owner of the property in question during the time alleged and that the defendant occupied the same during, etc., still this would not authorize the plaintiff to recover unless the jury believe, from the evidence, that the defendant acknowledged the rights of the plaintiff in the property and he held the same under the plaintiff. *Lockwood vs. Thunder*

Bay, etc., 42 Mich., 536; *Moses vs. Arnold*, 43 Iowa, 187; *Noyes vs. Loving*, 55 Me., 408; *Cent. Mills Co. vs. Hart*, 124 Mass., 123; *Moore vs. Harvey*, 50 Vt., 297; *Gallagher vs. Hirnilberger*, 57 Ind., 63.

§ 2. **Occupant, Liable for Rent, When—Illinois.**—The court further instructs the jury, that under the laws of this state, in all cases where lands belonging to one person are held and occupied by another, without any special agreement for the rent of such premises, the owner of the land may sue for, and recover as rent, a fair and reasonable satisfaction for such use and occupation of his land.

The court further instructs the jury, that if they believe, from the evidence, that the plaintiff, during the year — was the owner of the land for which rent is claimed in this suit, and that the defendant, during the same year, used and occupied said premises, by pasturing his cattle thereon, without any special agreement, as to the payment of rent, then under the laws of this state, the plaintiff has the right to recover in this suit, what such use and occupation was reasonably worth, under the evidence in this case. R. S. Ill., Chap. 80, § 1.

§ 3. **Lease not Modified or Surrendered—Suit for Rent.**—The court instructs the jury, that if they believe, from the evidence, that on or about, etc., the plaintiff and defendant entered into a verbal contract, by which the defendant rented the premises in question of the plaintiff for the then coming season, or for the then next year, and agreed to pay as rent therefor the sum of \$——, and the jury further believe, from the evidence, that that contract has never been modified, or rescinded, by any subsequent agreement of the parties, and that the defendant occupied the premises, under such original contract, then the plaintiff will have the right to recover the amount, so agreed to be paid as rent, from the defendant in this action.

If the jury believe, from the evidence, that the lease in question was executed by the plaintiff and defendant, and that the defendant went into the possession of the premises, under said lease, and also, that said lease has never been canceled, or surrendered, by the agreement of the parties, then the jury should find for the plaintiff, for the time during which they

believe, from the evidence, the rent has remained unpaid, at the rate of \$—— per year, unless the jury further believe, from the evidence, that the contract was subsequently modified, by agreement of the parties, and the rent reduced to \$—— per year, in which case the jury should calculate the rent due, at the rate of \$—— a year, since the making of such new arrangement, less the amount paid thereon, if they find, from the evidence, that any portion of the rent, coming due after that date, has been paid. *Strobie vs. Dills*, 62 Ill., 432.

If the jury believe, from the evidence, that the plaintiff and defendant executed the lease, introduced in evidence, and that the defendant entered into possession of the premises, therein described, under such lease, then the defendant is liable to pay to the plaintiff the amount of the rent accrued thereon, up to the day of, etc., after deducting such payments as the jury believe, from the evidence, have been made thereon, unless the jury further believe, from the evidence, that said lease has been canceled, surrendered or modified, by some subsequent agreement between the parties.

§ 4. **Surrender of Premises, How Effected.**—In respect to the alleged surrender of the premises, the court instructs the jury, that a valid surrender of a lease, and of the estate thereby created, can only be made by a mutual agreement, or assent of the landlord and tenant, to that effect. *Nelson vs. Thompson*, 23 Minn., 508; *Morgan vs. Smith*, 70 N. Y., 537; *Ladd vs. Smith*, 6 Oreg., 316.

§ 5. **Surrender Must be Assented to by Landlord.**—The jury are instructed, that no surrender of the premises in question, by the defendant, could take effect unless the plaintiff, by himself or by some authorized agent, accepted such surrender; and although the jury may believe, from the evidence, that the defendant vacated the premises in controversy, and gave notice thereof to the plaintiff, yet this alone would not exonerate the defendant from the payment of rent thereafter, unless the surrender was assented to by the plaintiff, as a surrender of the possession to him. *Taylor's Land. and Ten.*, § 515.

The jury are instructed, that although they may believe, from the evidence, that the defendant moved away from the

premises in question, and sent the keys of the building to the plaintiff, and that the plaintiff retained the keys, this alone would not constitute a surrender of the premises by the defendant, and an acceptance of such surrender by the plaintiff. *Townsend vs. Albert*, 3 E. D. Smith, 560; *Withers vs. Larabee*, 48 Me., 570.

That to constitute a valid surrender of a lease, or of leased premises, there must be an offer to surrender by the tenant and such offer must be accepted by the landlord.

§ 6. **Eviction Stops the Rent.**—The principle upon which a tenant is required to pay rent, is the beneficial enjoyment of the premises unmolested in any way by the landlord; and in this case, if the jury believe, from the evidence, that after defendant went into possession of the premises, the plaintiff took possession of any part of the premises leased, against the consent of the defendant, and in such a way as to prevent the defendant having the beneficial use of all the premises leased, this in law is an eviction, and releases the defendant from the payment of any more rent while such eviction continues.

§ 7. **Eviction from a Part of the Premises.**—Although the jury may believe, from the evidence, that the defendant has never been disturbed in, or evicted from, the main building on the leased premises, and that he has had the use and enjoyment of the same, still, if they further believe, from the evidence, that the plaintiff has taken possession of any material part of the premises leased without the consent of the defendant, this in law is an eviction, and the defendant is not bound to pay any rent, during the time of such eviction, for the part of the premises which he did use and occupy. *Taylor's Land. & Ten.*, § 378; *Walker vs. Tucker*, 70 Ill., 527; *Lewis vs. Payn*, 4 Wend., 423; *Colburn vs. Morrill*, 117 Mass., 262; *Day vs. Watson*, 8 Mich., 535; *Skaggs vs. Emerson*, 50 Cal., 3.

§ 8. **Forcible Expulsion not Necessary.**—Forcible expulsion is not necessary to cause an eviction; any act done in violation of the rights of the tenant without his consent, which deprives him of the beneficial use and enjoyment of a material part of the premises leased, will amount to an eviction; if the

jury in this case believe, from the evidence, that the plaintiff, after making the lease, without the consent of the defendant, took possession of any material part of the premises leased, then the defendant is released from the payment of all rent accruing after that date. *Taylor's Land. and Ten.*, § 381.

If you believe, from the evidence in this suit, that the plaintiff, after leasing the premises to the defendant, leased a part of said premises to one H. W., who has since taken possession of the same under the lease to him, then in law this is an eviction from the time the said H. W. so took possession, and the defendant is released from the payment of all rent accruing during such eviction. *Smith vs. Wise et al.*, 58 Ill., 141.

If you believe, from the evidence, that the defendant was a tenant of the premises at the time in question, under a lease from the plaintiff, and that against defendant's consent, and without any understanding or agreement permitting it, the plaintiff took possession of any material part of said premises and evicted the defendant therefrom, and prevented him from using and occupying the same, then such eviction worked an extinguishment of all rent for the whole of said premises from the time such eviction occurred, notwithstanding the defendant continued to occupy a portion of said premises after that time. *Price vs. P., Ft. W. & C. Ry. Co.*, 34 Ill., 13.

§ 9. **Acts of Trespass not Eviction.**—The court instructs the jury, that to constitute an eviction there must be something more than a mere trespass by the landlord; there must be something of a permanent character done by him, with the intention of depriving the tenant of the enjoyment of the premises, or of some part thereof. The question of eviction or no eviction is a question to be decided by the jury, in view of all the facts and circumstances proved on the trial.

The jury are instructed, that while the law is, that if the tenant loses the benefit of the enjoyment of any material portion of the demised premises by the willful act of the landlord, the rent is thereby suspended, yet to have this effect the act of the landlord must be something more than a mere trespass; it must be something of a permanent character, and have the effect of depriving the tenant of the enjoyment of the premises from which the eviction is alleged. *Taylor's Land. and Ten.*, § 380; *Lynch v. Baldwin*, 69 Ill., 210.

§ 10. **What Constitutes Eviction.**—The court instructs the jury, that some acts of interference by the landlord with the tenant's enjoyment of the premises may be mere acts of trespass, or they may amount to an eviction. The question whether they partake of the latter character depends upon the intention with which they are done, and the character of the acts. If they clearly indicate an intention on the landlord's part that the tenant should no longer continue to hold the premises, and he thereby loses the beneficial use of the same, this would constitute an eviction; otherwise they would amount to no more than acts of trespass. *Haynes et al. vs. Smith*, 63 Ill., 430; *Taylor's Land. and Ten.*, § 380; *Myers vs. Gemmel*, 10 Barb., 537; *Hazlett vs. Powell*, 30 Penn. St., 293; *Mirick vs. Hoppin*, 118 Mass., 582.

To constitute an eviction the acts of interference by the landlord with the tenant's possession must clearly indicate an intention, on the part of the landlord, that the tenant shall no longer continue to hold the premises, or some material part thereof. *Morris vs. Tillson*, 81 Ill., 607.

§ 11. **Landlord's Lien for Rent—By Statute.**—The jury are instructed, that the statute of this state gives a landlord a lien upon the crops grown or growing upon the demised premises, in any year, for the rent that shall accrue for that year, whether the rent be payable in money, labor, or a share of the crops raised; and this lien is not confined to any particular crop, but embraces all the crops, or any portion of them, no matter upon which particular part of the premises they were raised. *Thompson vs. Mead*, 67 Ill., 395.

Under our statute the landlord has a lien upon the crops grown and growing upon the demised premises, in any year, for the rent thereof for that year, and such lien continues for the period of six months after the expiration of the term for which the premises were rented, and no levy of the crops thus grown, or sale, under an execution against the tenant, will divest the landlord of such lien. *Miles vs. James*, 36 Ill., 399.

The law of this state gives a landlord a lien upon the crops grown or growing upon the premises, in any one year, for the rent thereof for that year, and it does not matter whether the crops are raised by the tenant to whom the premises were

leased by the landlord in the first instance, or whether they were raised by a sub-tenant under such prior lease. *Uhl vs. Dighton*, 25 Ill., 154.

§ 12. **Levy of Distress Warrant not Necessary to Perfect Lien.**—The court instructs the jury, that the law gives the landlord a lien upon the crops grown or growing upon the rented premises, in any one year, for the rent of that year; that such lien does not depend upon the levy of any distress warrant, but is given by the statute, and no creditor of the tenant can defeat the landlord's lien by levying an attachment or an execution upon the property before the issuing of a distress warrant by the landlord. *Mead vs. Thompson*, 78 Ill., 62.

§ 13. **Lien against Purchaser from Tenant, When.**—That a purchaser of grain raised by a tenant, upon which the landlord has a lien for rent, with full knowledge of that fact, and that the rent is not fully paid, will be liable to the landlord for the rent due to the extent of the value of the grain purchased by him.

The court instructs the jury, that the lien given to a landlord upon the crops grown or growing upon the demised premises, in any one year, for the rent of that year, cannot be defeated by a sale of such crop, or any portion of it, by the tenant to a person who has notice of the fact of the tenancy, and that the crop was raised on the premises rented.

And when a purchaser of corn from a tenant knows of the fact of tenancy, and that his vendor, as such tenant, had raised the corn on the demised premises, this will be notice to him of any lien the landlord may have upon the same for unpaid rent. *Watt vs. Scofield*, 76 Ill., 261.

The court instructs the jury, that if they believe, from the evidence, that when the defendant purchased the grain in question he knew that A. B. rented from the plaintiff the land whereon the grain was raised, and that he neglected and failed to inquire into the facts regarding the plaintiff's lien thereon, to the extent that a reasonably prudent man should have done under the circumstances proved, then the jury should find for the plaintiff. *Prettyman vs. Unland*, 77 Ill., 206.

§ 14. **Tenant Holding Over—Contract Implied.**—The court

instructs the jury, that when a tenant holds over after the expiration of his term, with the assent of the landlord, expressed or implied, if there is no special agreement to the contrary, it will be upon an implied agreement or liability to pay rent thereafter on the same terms as to amount and times of payment as were provided in the original lease. *Taylor's Land. and Ten.*, § 525; *Clapp vs. Noble*, 84 Ill., 62; *Weston vs. Weston*, 102 Mass., 514; *Schuyler vs. Smith*, 51 N. Y., 309; *Bacon vs. Brown*, 9 Conn., 334; *Finney vs. St. Louis et al.*, 39 Mo., 177.

When a person rents property for a definite period of time, as for a year, and the tenant remains in possession of the premises, holding over after the expiration of the term for which the property was rented, and after a reasonable time for surrendering up the possession, with the consent of the landlord, expressed or implied, but without any new agreement, the law will imply a new leasing for the same length of time as the original leasing and upon the same terms.

In this case, if you believe, from the evidence, that some time, or about, etc., the defendant leased the premises in question for the then next ensuing season (*or year*), agreeing to pay therefor the sum of \$—; and if you further believe, from the evidence, that after the expiration of that lease the defendant went on in the use and occupation of the premises, in the same manner as he had used them under the lease, with the consent of the plaintiff, but without any new contract between the parties, until the month of, etc., then the law would imply a new renting for the season (*or year*) of —, upon the same terms as the original renting.

Where a tenant holds over after the expiration of his lease, a continuance of the tenancy on the same terms will be presumed against him; and where a tenant, from year to year, continues to occupy and enters upon another year, with the knowledge of the landlord, without objection from him, a tenancy for another year is thus created, upon the same terms and conditions as those of the year before.

§ 15. **New Contract Implied, When.**—That when a tenant, under a lease from year to year, is notified by his landlord, before the expiration of his term, that if he occupies the

premises another year he will have to pay a certain increased rent, and the tenant holds over without any further contract or understanding between the parties, such act of holding over will be construed as an implied agreement that he will hold the premises upon the new terms imposed. *Despard vs. Walbridge*, 15 N. Y., 374; *Higgins vs. Halligan*, 46 Ill., 173; *Hunt vs. Bailey*, 39 Mo., 257.

§ 16. **When Contract not Implied from Holding Over.**—If the jury believe, from the evidence, that the plaintiff never consented to remain in the premises for any term after the expiration of his lease, but merely held over for six or seven days, and then moved out, and never paid any rent after the expiration of his lease, nor did anything indicating any intention to stay in the premises for any further term after such expiration, then he is only liable to pay the rent for the time he did stay in the premises.

The jury are instructed, as a matter of law, that where a tenant occupies premises under a lease for a year or years and holds over after the expiration of the lease without making any new arrangement with the landlord, regarding such holding over, then the tenant may, at the election of the landlord, be treated as a tenant for another year upon the terms of the original lease. Whether in this case the defendant did hold over after the termination of his lease, and if he did, whether such holding over was with the consent of the plaintiff, or under any new arrangement between the parties, are all questions of fact to be determined by the jury from the evidence in the case.

The jury are instructed, that the mere holding over by a tenant after the expiration of his lease without any new arrangement or agreement with his landlord, is not of itself sufficient to create a new tenancy from year to year, but in such case, if the landlord elects to consider such holding over a renewal of the tenancy, it will in law amount to such renewal. But whether in this case, etc. (as in last instruction to the end).

§ 17. **Wrongful Holding Over—Illinois.**—The court instructs the jury, that when a lease has expired by its terms and the

tenant holds over, such holding, though intentional, is not within the statute imposing the penalty of double rent, unless such holding over is knowingly and willfully wrongful. When a tenant continues to hold over, after the expiration of his lease, under a reasonable belief that he was doing so rightfully, he does not incur the penalty of double rent for holding over.

That the question whether the defendant wrongfully held over the possession of the premises after the expiration of his lease, is a question of fact to be determined by the jury, from all the evidence in the case; and though the jury may believe, from the evidence, that the defendant did hold over wrongfully, still if they further believe, from the evidence, that the defendant had reasonable grounds for believing, and did believe, he had a right to hold over, then he would not be liable to the penalty of paying double rent for the premises. *Stewart vs. Hamilton*, 66 Ill., 255.

§ 18. **Tenant Cannot Deny Landlord's Title.**—The court instructs the jury, as a matter of law, that a tenant is not permitted to deny the title of his landlord to the premises leased nor the title of those who hold under the landlord. And in this case, if the jury believe, from the evidence, that the defendant leased the premises in question from the mother of the plaintiff, and took possession of the same under such lease, and has not since surrendered up such possession, then, if the jury further believe, from the evidence, that the mother of plaintiff is dead, and that she willed the premises to the plaintiff, as claimed, then the defendant is not permitted to deny the plaintiff's title, so long as the defendant remains in such possession.

§ 19. **Landlord not Bound to Repair.**—The jury are instructed, that under the lease introduced in evidence the landlord was under no obligation to make repairs on the premises, or to pay for any made by defendant; and unless the jury believe, from the evidence, that some subsequent agreement or arrangement has been made by the parties, by which the plaintiff has agreed to make such repairs, or to pay for those made by defendant, then, as to the question of repairs, the jury should find for the plaintiff.

That without some express agreement to that effect, a landlord is under no obligation to make repairs on the premises during the time for which they are leased. *Taylor's Land. and Ten.*, § 327.

§ 20. **Title to Crops.**—The title to the crop raised on rented land is not in the landlord, so as to empower him to sue for and recover upon it in trespass, or its value in trover. He has a special lien upon it given by statute, which may be enforced by distress for rent. *Morrill vs. Barnes*, 57 Ga., 404.

The law is, in the case of a leasing of land for a share of the crops raised, to be divided after they are raised and gathered, that the title to the whole of the crop will be and remain in the tenant, until the crop has been divided and possession given to the landlord of his share. *Sargent vs. Courier*, 66 Ill., 245; *Townsend vs. Isenberger*, 45 Ia., 670.

In farming on shares, the tenant, as against the landlord, is entitled to the possession of the whole crop while it is growing, and may recover damages from the landlord if the cattle of the latter wrongfully break into the field and injure the crop. *Froot vs. Hardin*, 56 Ind., 165.

NOTE.—It seems, the tenant, farming land on shares, cannot sue the landlord in trespass to recover for injury done to the growing crop by live stock belonging to the landlord, for the parties are co-tenants of the property. *Wells vs. Hollenbeck*, 37 Mich., 504.

§ 21. **Tenant's Right to Remove Fixtures.**—If the jury believe, from the evidence, that the defendant, while occupying the premises in question under a lease from the plaintiff, erected the (cribs) in controversy for his own use and benefit while he should occupy the farm and without any agreement or understanding with the plaintiff that they should be left on the place, then the defendant had a right to take down and remove the cribs at any time before or at the expiration of his lease.

If the defendant leased the storeroom in question of the plaintiff for the period of, etc., and afterwards, for his own use and benefit, placed the (counters) in controversy in the building with the intention of removing the same at the expiration of his lease, and without any agreement or understanding with the plaintiff that they would be left in the building, then the defendant had the right, etc.

The jury are instructed, as a matter of law, that a tenant's right to remove a building or other improvement placed on leased land is restricted to the duration of his tenancy. If not removed before the tenant abandons the premises the building or other improvement becomes a part of the freehold and belongs to the owner of the land. *Griffin vs. Ransdell*, 71 Ind., 440; *Watriss vs. Cambridge Bank*, 124 Mass., 571; *Merritt vs. Judd*, 14 Cal., 59; *Ewell on Fixtures*, 143.

If a tenant omit to remove fixtures placed by him on the leased premises, until after his right to use and occupy the premises has expired, and his possession has become wrongful, then he is deemed to have abandoned his right of removal, and, if he afterwards remove them, he is a trespasser. *Cromie vs. Hoover*, 40 Ind., 49.

CHAPTER XXVII.

LIMITATIONS.

- SEC. 1. Statute a bar, when.
2. Payment, a new promise.
3. When the statute begins to run.
4. Running accounts.
5. Absence from the State.
6. Debt revived by new promise.
7. Must be a promise to pay the debt.
8. What amounts to a promise.
9. What is not a promise.
10. Fraud and deceit.

§ 1. **Statute a Bar, When.**—The court instructs the jury, that in cases like the one on trial, unless the suit is commenced within (*five*) years after the cause of action accrues, then the statute of limitations is a complete bar. And, in this case, if the jury believe, from the evidence, that suit was not commenced within (*five*) years after the cause of action accrued, that is within (*five*) years after the debt sued for became due, then the statute of limitations is a complete bar to this suit, and the jury must find for the defendant; unless the jury further believe, from the evidence, that the defendant has made a new promise to pay the debt within (*five*) years of the commencement of the suit.

§ 2. **Payment a New Promise.**—If the jury believe, from the evidence, that prior to the spring of, etc., there has been a running account between the plaintiff and defendant, and that at that time the defendant made a payment to the plaintiff upon that account generally, then a suit by either party for any balance claimed to be due on such account could have been brought by such party at any time within (*five*) years from the date of such payment.

§ 3. **When the Statute Begins to Run.**—As regards the de-
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fense of the statute of limitations interposed in this case, the jury are instructed, that if one person gives credit to another until he gets into a certain condition financially, or until the happening of a certain event or contingency, then a cause of action will not arise until the party gets into such financial condition, or until such event or contingency has happened; and the statute of limitations does not begin to run until the cause of action has arisen, that is, until a suit could be brought for the debt. 2 Par. on Cont., 370; See *Bradly vs. Cole*, 25 N. W. Rep., 851, note.

You are instructed, that the statute of limitations does not begin to run, in any case, till the cause of action has accrued; that is, not till the party has a right to sue and recover on the demand; and when a credit has been given, the statute does not begin to run till the credit has expired.

And, in this case, if you believe, from the evidence, that any credit was given by plaintiff to defendant, then the (*five*) years' limitation did not begin to run until the expiration of that credit.

§ 4. **Running Accounts.**—The court instructs the jury, as a matter of law, that in the case of running accounts between parties, the date of the last transaction, which was properly the subject matter of entry in such account, or the date when such item became payable, is the time at which the right of action accrues for the recovery, by either party, of any balance remaining due on such accounts. *Bradly vs. Cole*, 25 N. W. Rep. 852, note.

If there be mutual running accounts between parties, and there is any item for which a credit or a charge could be properly made within (*five*) years before bringing suit, or where a payment has been made by one of the parties upon the account within (*five*) years, such credit, charge or payment is evidence of a promise implied by law to pay the balance of such account. And, in such case, a suit for such balance, if brought within (*five*) years after such credit, charge or payment, is not barred by the statute of limitations. *Burch vs. Woodworth*, 36 N. W. Rep. 721.

If you believe, from the evidence, that there are mutual running accounts between the parties, and involved in this

suit, and that any items thereof were created in favor of the respective parties within (*five*) years prior to the commencement of this suit, then the statute of limitations should not be allowed as a bar against any part of such accounts, whether for plaintiff or defendant. And, in such case, it is immaterial whether such demands, or any part thereof, consist of book accounts, or rest merely in memory; neither is it material, in such case, whether any or all of such demands consist of money loaned, goods furnished, labor performed, or for board or rent. In either case the whole of such accounts should be taken into consideration by the jury, without reference to the statute of limitations. Angell on Lim., § 147; 2 Greenleaf Ev., § 445; *Hannon vs. Engleman*, 5 N. W. Rep. 791.

§ 5. **Absence from the State.**—The jury are instructed, that if a party be out of the state, so that process cannot be served on him at the time the cause of action accrues, then the statute does not commence to run until he returns within the state again; and, in such case, it is not necessary that the party should absolutely remove from the state, without an intention of returning. Any absence from the state, when the cause of action accrues, suspends the operation of the statute for the time being.

You are instructed, that if a party is residing within this state when the cause of action against him accrues, then, in order that his absence from the state shall suspend the operation of the statute, it must appear not only that he has left the state, but also that he resides out of the state. (*Ill. Statute.*) *Bradly vs. Cole*, 25 N. W. Rep. 857, note.

§ 6. **Debt Revived by New Promise.**—The jury are instructed, that where there has once been a legal obligation to pay, and it has become barred by the statute of limitations, the moral obligation to pay the debt is a sufficient consideration to support a subsequent promise to pay; and in this case, though the jury may find, from the evidence, as to any of the plaintiff's demands, that the same were once due from the defendant, but that the cause of action accrued more than (*five*) years prior to the commencement of this suit, yet, if the jury further find, from the evidence, that the defendant has, within

the said period of (*five*) years, promised the plaintiff to pay such debt, then, as to such demand, the jury should find for the plaintiff. *Bradly vs. Cole*, 25 N. W. Rep., 857, note.

§ 7. **The Promise Must be a Promise to Pay the Debt.**—The jury are instructed, that when a new promise is relied upon to take a case out of the statute of limitation, the promise must be a promise to pay the debt. The word promise need not be used, but there must be language used from which a promise may be fairly implied.

§ 8. **What Amounts to a Promise.**—If the jury believe, from the evidence, that the defendant, upon the occasion when the new promise is claimed to have been made, said to the plaintiff, ("*I know the debt is due, and ought to be paid,*") this language would authorize the jury to infer a promise to pay the debt.

§ 9. **What is Not a Promise.**—If the jury believe, from the evidence, that upon the occasion referred to by the witnesses, the defendant said, ("*that account is correct,*") or, ("*I received the money,*") or ("*I had the goods,*") or ("*that is my note,*") this would not alone amount to a promise to pay the debt. *Ayers vs. Richards*, 12 Ill., 146.

§ 10. **Fraud and Deceit.**—The court instructs the jury, that in the case of a claim or demand founded on fraud and deceit, the statute of limitation does not begin to run until after the fraud and deceit are discovered by the injured party. *McAlpine vs. Hedges*, 21 Fed. Rep., 689; *Odell vs. Burnham*, 61 Wis., 562; *Parker vs. Kuhn*, 21 N. W. Rep., 74.

Though you may believe, from the evidence, that a fraud was practiced upon the plaintiff in manner and form as charged in his declaration, still, if you further believe, from the evidence, that the plaintiff discovered the fraud, or by the use of reasonable care and diligence could have discovered it, more than (*five*) years prior to the commencement of this suit, then the statute of limitations constitutes a bar to the plaintiff's right to recover, and you should find for the defendant.

If you believe, from the evidence, that a fraud was prac-

ticed upon the plaintiff, as charged in his declaration, still, if you further believe, from the evidence, that it was done more than (*five*) years prior to the commencement of this suit, then, under the pleadings in this case, the statute of limitations bars the plaintiff's right of recovery against the defendant.

CHAPTER XXVIII.

MALICIOUS PROSECUTION.

- SEC. 1. What must be proved.
2. Charge must be willfully false.
3. What is probable cause.
4. Arrest without probable cause.
5. Malice may be inferred from want of probable cause.
6. Burden of proof on the plaintiff.
7. What is a want of probable cause.
8. Want of probable cause cannot be inferred from malice.
9. Not necessary that a crime should have been committed.
10. The prosecution must be ended.
11. Discharge by the justice.
12. Advice of counsel.
13. Presumption from good character.

§ 1. **What Must be Proved.**—The court instructs the jury, that if they believe, from the evidence, that the defendant maliciously caused the arrest and imprisonment of the plaintiff, without probable cause, as alleged in the declaration, then the jury should find for the plaintiff, and assess his damages at what they think proper, from the facts and circumstances proved, not exceeding, however, the amount claimed in the declaration.

If the jury believe, from the evidence, that the defendant had probable cause to believe that the plaintiff was guilty of the offense charged against him, then it is not material whether the defendant was actuated by proper or improper motives in instituting the criminal proceedings against the plaintiff. To authorize a recovery in this class of cases it must not only appear that the defendant was actuated by malice, but the jury must further believe, from the testimony, that the defendant had no probable cause, or no reasonable ground, to believe that the plaintiff was guilty of the offense charged against him. And the court further instructs the jury, that probable cause means a reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a

reasonably cautious man in the belief that the person accused is guilty of the offense charged. *Ames vs. Snider*, 69 Ill., 376; *Flickinger vs. Wagner*, 46 Md., 580; *Josselyn vs. McAlister*, 22 Mich., 300; *Carey vs. Sheets*, 67 Ind., 375.

The court instructs the jury, that want of probable cause, though negative in its character, must be shown by the plaintiff, by affirmative evidence, and the jury have no right to infer it from any degree of malice which may be proved. *Brown vs. Smith*, 83 Ill., 291; *Cottrell vs. Richmond*, 5 Mo. App., 588; *Lavender vs. Hodgins*, 23 Ark., 763; *Smith vs. Zent*, 59 Ind., 362; *Evans vs. Thompson*, 12 Heisk., 534.

§ 2. **Charge must be Willfully False.**—To sustain the charge of malice, the criminal charge must appear, by a preponderance of the evidence, to have been willfully false. To sustain a suit for malicious prosecution, the facts ought to be such as to satisfy any unprejudiced, reasonable mind that the accused had no ground for the prosecution, except his desire to injure the accused. *Harpham vs. Whitney*, 77 Ill., 32.

§ 3. **What is Probable Cause.**—That to constitute probable cause for a criminal prosecution, there must be such reasonable grounds of suspicion, supported by circumstances, sufficiently strong in themselves, to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged. *Cooley on Torts*, 181; *Farnam vs. Feeley*, 56 N. Y., 451; *Winebiddle vs. Porterfield*, 9 Penn. St., 137; *Collins vs. Hayte*, 50 Ill., 353; *Fagnan vs. Knox*, 66 N. Y., 525.

Upon the question, whether the defendant had probable cause for commencing, etc., the jury are instructed, that the true inquiry for them to answer is not what were the actual facts as to the guilt or innocence of the plaintiff, but what did the defendant have reason to believe, and what did he believe in reference thereto, at the time he made the complaint. *Galoway vs. Burr et al.*, 32 Mich., 332.

The jury are instructed, that a mere belief that an innocent man is guilty of a crime, is not alone sufficient to justify causing his arrest—the facts must be such as would justify an ordinarily intelligent and a reasonably prudent person in entertain-

ing such belief. Whether, in this case, such facts had come to the knowledge of the defendant at the time he entered the complaint against the plaintiff, is a question of fact for the jury to determine from a preponderance of evidence. *Hays vs. Blizzard*, 30 Ind., 457.

The jury are instructed, that in determining whether the defendant had probable cause to believe that the plaintiff was guilty, etc., they should consider that question in reference to the facts and circumstances relating thereto, and which influenced him in commencing proceedings against the plaintiff, as they were known or as they reasonably appeared to be at the time he made the complaint, and not by the facts and circumstances as they have been developed by the evidence on this trial. *Scott vs. Sheler*, 28 Gratt., 891.

If you believe, from the evidence, that defendant had probable cause to institute the criminal proceedings, then the plaintiff cannot recover in this suit; and probable cause is defined to be reasonable ground for suspicion, supported by circumstances sufficiently strong themselves to warrant an impartial and reasonably cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Smith vs. Zent*, 58 Ind., 362.

Probable cause for instituting a criminal prosecution is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged. *Galloway vs. Burr*, 32 Mich., 332; *Ames vs. Snider*, 69 Ill., 376.

§ 4. **Arrest without Probable Cause.**—If the jury believe, from the evidence, that the defendant maliciously caused the arrest of the plaintiff, on a criminal charge, without probable cause to believe that he was guilty of the crime alleged against him, as charged in the declaration, then the jury should find the defendant guilty.

§ 5. **Malice may be Inferred from Want of Probable Cause.**—The court instructs the jury, that if they believe, from the facts and circumstances proved on this trial, that defendant had not probable cause for prosecuting the plaintiff, and that

he did prosecute him, as charged in the declaration, then the jury may infer malice from such want of probable cause. *Cooley on Torts*, 185; *Ewing vs. Sanford*, 19 Ala., 605; *Harkrader vs. Moore*, 44 Cal., 144; *Pankett vs. Livermore*, 5 Clarke (Ia.), 277; *Krug vs. Ward*, 77 Ill., 603; *Holliday vs. Sterling*, 62 Mo., 321; *Edgeworth vs. Carson*, 43 Mich., 241; *Wertheim vs. Altschuler*, 12 N. W. Rep., 107.

If a criminal prosecution is shown to be without reasonable or probable cause, the jury may infer malice.

"If you believe, from the facts and circumstances as given in evidence, that the defendant had not probable cause for the arrest and imprisonment of the plaintiff, then and in such case you may infer malice from such want of probable cause." *Roy vs. Goings*, 112 Ill., 662.

The jury are instructed, as a matter of law, that the commencement of a criminal prosecution, simply for the purpose of collecting a debt or private claim, is an abuse of the process of the court, and would be conclusive evidence of malice on the part of the person commencing such proceeding, and in such case the advice of counsel would be no protection. Whether in this case the proceedings were commenced against the plaintiff with a *bona fide* intention of prosecuting a supposed criminal offense or merely for the purpose of securing a private claim, are questions to be determined by the jury, from the evidence. *Livingston vs. Burroughs*, 33 Mich., 511.

The jury are instructed, that the prosecution of a person criminally, with any other motive than that of bringing a guilty person to justice, is a malicious prosecution. If made to procure the surrender of the prosecutor's note, it is malicious in law.

If you believe, from the evidence, that when the defendant made the complaint before the justice, he did not have probable cause to believe that such complaint was true, then you may infer malice, and express malice need not be proved.

The jury are instructed, that while the law is, that they may infer malice from the want of probable cause for the institution of the criminal prosecution against the plaintiff, if they believe, from the evidence, that such prosecution was commenced without probable cause, still, the jury are not bound to infer malice from that fact. The law is, that malice may

be, but it is not necessarily, inferred from want of probable cause for the commencement of a criminal prosecution. *Panket vs. Livermore*, 5 Ia., 277; *Smith vs. Howard*, 28 Ia., 51; Cooley on Torts, 185.

§ 6. **Burden of Proof on the Plaintiff.**—The jury are instructed, that to warrant a conviction in this case, the plaintiff must not only prove malice, but he must also show that there was no probable cause for the prosecution in question; and the defendant is not bound to prove probable cause unless the plaintiff has introduced some evidence tending to show the absence of it. And though the jury may believe, from the evidence, that the plaintiff has shown malice on the part of the defendant, in causing the criminal prosecution in question to be commenced, still, if the jury further believe that the plaintiff has failed to show, by a preponderance of evidence, the want of probable cause, then the jury should find for the defendant. 1 Hill. on Torts, 416; *Burton vs. St. Paul, M. & M. Ry. Co.*, 22 N. W. Rep. 300; *Dwain vs. Descalso*, 5 Pac. Rep. 903.

The jury are instructed, that to warrant a verdict for the plaintiff in an action for malicious prosecution, there must be malice on the part of the prosecutor, and a want of probable cause for believing that the accused is guilty of the offense charged. If the prosecuting witness acts in good faith, on evidence, whether true or false, which is sufficient to create, in the mind of a reasonably cautious man, a belief of the guilt of the accused, he is protected and justified in commencing the prosecution.

The jury are instructed, that the information that will justify the making of a criminal complaint against another, for the purpose of having him arrested, must be of such a character, and obtained from such sources, that business men generally of ordinary care, prudence and discretion, would feel authorized to act upon it under similar circumstances. And, in this case, if the jury believe, from the evidence, that the defendant made the alleged affidavit, before the justice of the peace, for the arrest of the plaintiff, and that he was arrested in consequence thereof, then it is a question of fact to be determined by the jury, from the evidence, whether the

defendant, when he made the complaint, acted upon such information as men of ordinary care, prudence and discretion would have felt warranted in acting upon under similar circumstances. *Livingston vs. Burroughs*, 33 Mich., 511.

The jury are instructed, that to entitle the plaintiff to recover, the jury must find, from the evidence, three material points: first, that the prosecution complained of was commenced by the defendant through malice; second, that it was without probable cause; and, third, that the prosecution was determined and ended before the commencement of this suit. And if the plaintiff has failed to show, by a preponderance of evidence, either one of these three propositions, the jury should find for the defendant.

§ 7. **What is a Want of Probable Cause.**—If the jury believe, from the evidence, that the defendant instituted a criminal proceeding against the plaintiff, as charged in the declaration, and if they further find, from the evidence, that there were no circumstances connected with the transaction, out of which the prosecution grew, and that no information regarding it came to the knowledge of defendant, which would warrant a reasonable and prudent man in believing that the plaintiff was guilty of the charge made against him, then there was no probable cause for the prosecution. *Mc Williams vs. Hoben*, 42 Md., 56; *Harpham vs. Whitney*, 77 Ill., 32.

§ 8. **Want of Probable Cause Cannot be Inferred from Proof of Malice.**—The court instructs the jury, that in order to sustain the action for malicious prosecution, it must be proved, by a preponderance of the evidence, that the prosecution complained of was made with malice, and also without probable cause; and if both these requisites are not so proved, the jury should find for the defendant. *Cooley on Torts*, 184; *Casperson vs. Sproule*, 39 Mo. 39; *Center vs. Spring*, 2 Clarke (Ia.), 393; *Heyne vs. Blair*, 62 N. Y., 19; *Skidmore vs. Bricker*, 77 Ill., 164.

Although the jury may believe, from the evidence, that the criminal prosecution complained of was made by the defendant through malice, still the jury must not infer want of probable cause from such malice. Want of probable cause must

be made to appear from the evidence, or else the jury must find for the defendant, no matter how malicious the jury may find the defendant's motives to have been, in instituting the criminal prosecution.

§ 9. **Not Necessary that a Crime Should Have Been Committed.**—The court instructs the jury, that to justify an arrest on a criminal charge, it is not required that a crime shall in fact have been committed. If the facts which come to a person's knowledge are such as to create a belief that a crime had been committed by the person charged, in the mind of an impartial, reasonable man, this would be sufficient to constitute probable cause for making an arrest, although no crime had in fact been committed. *Flickinger vs. Wagner*, 46 Ind., 580.

If the jury believe, from the evidence, that the defendant, when he instituted the prosecution complained of, honestly believed the plaintiff was guilty of the offense charged, and that defendant's belief was founded on a knowledge of circumstances tending to show such guilt, and sufficient to induce, in the mind of an ordinarily reasonable and cautious man, the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause. *Hirsch vs. Feeney*, 83 Ill., 548; *Brennan vs. Tracy*, 2 Mo. App., 540.

A party making complaint against another, and procuring his arrest upon a criminal charge, is not bound to prove his guilt or procure the finding of an indictment against him, at the peril of being personally liable in an action for damages. If he acts upon probable cause, he is excusable, whatever the result of the prosecution.

In an action for malicious prosecution, the burden of proof is on the plaintiff to show that the defendant acted maliciously, and without any reasonable or probable cause. *Calef vs. Thomas*, 81 Ill., 478; *Fleckinger vs. Wagner*, 46 Md., 580; *Brennan vs. Tracy*, 2 Mo. App., 540.

§ 10. **The Prosecution must be Ended.**—The jury are instructed, that in order to maintain an action for malicious prosecution, it must appear, from the evidence, that the alleged malicious prosecution has been legally terminated. Striking the case from the docket, on motion of state's attorney, with

leave to reinstate the same, is not a legal termination of the prosecution. *Blalock vs. Randall*, 76 Ill., 224; *Clark vs. Cleveland*, 6 Hill., 344; *Cardinal vs. Smith*, 109 Mass., 159; *Leever vs. Hammill*, 57 Ind., 423; *Casebeen vs. Rice*, 23 N. W. Rep., 693.

§ 11. **Discharge by Justice.**—That the fact that the plaintiff was discharged by the justice of the peace before whom he was brought, upon the charge made against him, is not such evidence of a want of probable cause as will alone sustain an action for a malicious prosecution. *Thorpe vs. Balliett*, 25 Ill., 339.

§ 12. **Advice of Counsel.**—If a party about to commence a criminal prosecution communicates to the state's attorney all the material facts affecting the question of the guilt of the party about to be accused, which are known to him, or of which he had notice, and then acts upon his advice, the presumption of malice is rebutted, and an action against him for malicious prosecution will fail. *Calef vs. Thomas*, 81 Ill., 478; *Andersen vs. Frind*, 71 Ill., 475; *McCarthy vs. Kitchen*, 59 Ind., 500; *Johnson vs. Miller*, 29 N. W. Rep., 743; *Smith vs. Austin*, 49 Mich., 286.

The court instructs the jury, as a matter of law, that when a party communicates to counsel in good standing all the facts bearing upon the guilt of the accused, of which he has knowledge, or could have ascertained by reasonable diligence, and in good faith acts upon the advice of such counsel in prosecuting the party accused, he cannot be held responsible for malicious prosecution. *Josselyn vs. McAllister*, 22 Mich., 300; *Andersen vs. Frind*, 71 Ill., 475; *Ash vs. Marlow*, 20 Ohio, 119; *Walter vs. Sample*, 25 Pa. St., 275; *Sharpe vs. Johnson*, 59 Mo., 557; *Acton vs. Coffman*, 36 N. W. Rep., 775.

The court instructs the jury, that if they believe, from the evidence, that the defendant, before he instituted the criminal prosecution, fully, fairly and truthfully stated all the facts and circumstances in relation to the alleged crime, to respectable counsel, and that such counsel advised him that he had reasonable cause to institute the criminal proceedings against the plaintiff, and that the defendant, in good faith, acted upon such

advice, then the plaintiff cannot maintain this action, whether the defendant in the criminal prosecution was guilty or not; and the jury should find for the defendant. *Ross vs. Innes*, 26 Ill., 259.

The court instructs the jury, that whether or not the defendant did, before instituting the criminal proceedings, make a full, fair and honest disclosure to the attorney of all the material facts bearing upon the guilt of the plaintiff, of which he had knowledge, and which he could have ascertained by reasonable diligence, and whether, in commencing such proceedings, the defendant was acting in good faith upon the advice of his counsel, are questions of fact to be determined by the jury, from all the evidence and circumstances proved in the case. And if the jury believe, from the evidence, that the defendant did not make a full, fair and honest disclosure of all such facts to his counsel, then such advice can avail him nothing in this suit. *Roy vs. Goings*, 112 Ill., 663.

If you believe, from the evidence, that the defendants instituted the criminal prosecution from a fixed determination of their own, rather than from the opinions of legal counsel, or that a full, fair and true statement of all the facts known to them was not submitted to the counsel, then, in either case, the opinion given by the counsel is no defense in this action, if you believe, from the evidence, that the criminal charge was false, and made without probable cause. "Before the defendant can shield himself by the advice of counsel, it must appear, from the evidence, that he made, in good faith, a full, fair and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care, have obtained, to a respectable attorney in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against the plaintiff." *Roy vs. Goings*, 112 Ill., 663; *Logan vs. Waytag*, 57 Ia., 107; *Porter vs. Knight*, 19 N. W. Rep., 282.

The jury are instructed, that if they believe, from the evidence, that the plaintiff was charged, arrested and treated, as stated in his declaration, and that the only ground for that charge and arrest was the retention of the \$——, mentioned

by the witnesses, and that the defendant knew, at the time he advised with his attorney, that the plaintiff, in good faith, claimed the right to pay himself that money on his salary, and that he did not state that fact to his attorney, then the attorney's advice is no protection to him in this suit.

§ 13. **Presumption from Good Character.**—If the jury believe, from the evidence, that the plaintiff, up to the time of his arrest, uniformly bore a good reputation for honesty and integrity, and that defendant knew his reputation to be such up to the time of his arrest, then that fact is a proper one to be considered by the jury, in connection with all the other evidence in the case, in determining whether or not defendant had probable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the crime charged against him. *Woodworth v. Mills*, 61 Wis., 44.

CHAPTER XXIX.

MALPRACTICE.

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- SEC. 1. Warranty of skill, knowledge and care implied.
2. Patient bound to follow instructions.
3. Burden of proof.

§ 1. **A Warranty of Skill, Knowledge and Care Implied.**—The court instructs the jury, that if a person holds himself out to the public as a physician and surgeon, he must be held to possess and exercise ordinary skill, knowledge and care in his profession in every case of which he assumes the charge, whether in the particular case he receives fees or not. *McNevins vs. Lowe*, 40 Ill., 209; 1 Hill. on Torts, 224; *McCandless vs. McWha*, 22 Penn., 261; *Simonds vs. Henry*, 39 Me., 155; *Geiselman vs. Scott*, 25 Ohio St., 86.

Where an injury results from a want of ordinary skill, or from a failure to exercise ordinary skill or attention in the treatment of a case, the physician or surgeon is held responsible for such injury. *Barnes vs. Means*, 82 Ill., 379.

The highest degree of care and skill is not required of a physician to relieve him from liability for damages resulting from his treatment of a patient—only reasonable care and skill are required. *Holtzman vs. Hoy*, 118 Ill., 534.

While persons, who hold themselves out to the public as physicians and surgeons, are not required to possess the highest degree of knowledge and skill which the most learned in their profession may have acquired, yet they are bound to possess and exercise, in their practice, at least the average degree of knowledge and skill possessed and exercised by the members of their profession generally in the locality in which they practice. *Gates vs. Fleischer*, 67 Wis., 504; *Gramm vs. Boener*, 56 Ind., 497. See *Smother vs. Hanks*, 34 Ia., 286; *Almon vs. Nugent*, 34 Ia., 300.

Every person who offers his services to the public generally,

in any profession or business, impliedly contracts with those who employ him, that he is a person of the skill and experience which is possessed, ordinarily, by those who practice, or profess to understand the same art or business, and which is generally regarded by those most conversant with that profession or employment, as necessary to qualify him to engage in such business successfully. *Holtzman vs. Hoy*, 118 Ill., 534.

A surgeon who offers his services to the public as such, impliedly contracts with his employer, that he has ordinary knowledge and skill in his profession; and also, that he will use reasonable and ordinary care and diligence, in the exertion and application of his skill and knowledge, to accomplish the purpose for which he is employed.

If the jury believe, from the evidence, that the defendant, ———, held himself out to the public as a physician and surgeon, and that he was employed to treat, as a surgeon, an injury sustained by the plaintiff, as charged in the declaration, and that he undertook such employment, and that he did not treat the said injury with ordinary skill and knowledge, and that the plaintiff sustained any injury or damage by reason thereof, then the jury should find for the plaintiff. *Hallam vs. Means*, 82 Ill., 379.

If the jury believe, from the evidence, that the plaintiff, having broken his leg, employed the defendant, as his physician and surgeon, to set and attend to the same, and that the defendant, holding himself out as a physician and surgeon, undertook and entered upon such employment, then the plaintiff was entitled to receive from the defendant the care, attention and skill of an ordinarily skillful physician and surgeon.

And if, from the evidence in the case, the jury further believe, that the plaintiff did not receive from the defendant such care, attention and skill, and that in consequence thereof, and without fault on his part, the plaintiff suffered increased pain, and suffered the injury complained of in the declaration, then the defendant is liable in this suit, and the jury should render a verdict for the plaintiff. *Kendall vs. Brown*, 86 Ill., 387.

The care and skill a surgeon should use in the practice of his profession, should be proportionate to the character of the injury he treats, within the limits of all ordinary skill and

knowledge, and if the jury believe, from the evidence, that the injury in question was severe, and that the defendant, ———, did not treat it with the skill and care its severity reasonably demanded, within the limits of ordinary surgical skill and knowledge, and that the plaintiff was injured by the want of such skill and care, they will find for the plaintiff.

If the jury believe, from the evidence, the plaintiff has sustained any injury by reason of the unnatural or improper position of the (*ulna*), or either of the bones of the wrist or forearm mentioned in the declaration, and that such improper or unnatural position of said bones resulted from want of ordinary skill, or from the negligence of the defendant, while treating the injury in question, as physician or surgeon, then the defendant would be liable in damages for said injury.

If the jury believe, from the evidence, that during the time that the defendant was treating the injury in question, the principles and practice of good surgery required that passive motion should have been commenced and practiced in the wrist or fingers of said plaintiff, and that the defendant did not advise or practice such passive motion, and that the plaintiff sustained damage thereby, the defendant would be liable for the damage so sustained.

If the jury believe, from the evidence, that the defendant did not use ordinary skill and diligence as a surgeon, in the treatment of the plaintiff's injuries, as alleged in the declaration in this case, and that, as a consequence thereof, the plaintiff has suffered damages, the jury should find for the plaintiff and assess the damages in such an amount as they believe, from the evidence, he has sustained, not exceeding \$——.

If the jury believe, from the evidence, that the defendant, in the treatment of the injury in question, did not exhibit the knowledge and skill of an ordinary good surgeon, or did not apply such knowledge and skill with reasonable care and attention, and that by reason thereof the plaintiff suffered damage, it affords no excuse to the defendant that other surgeons were called in and examined the injury, without his knowledge or consent, unless it appears that the interference of such surgeons in some manner tended to produce the injurious consequences complained of.

§ 2. **Patient Bound to Follow Instructions.**—The court instructs the jury, that where a person employs a physician or surgeon to treat a disease or an injury the patient is bound to adopt and follow out all reasonable directions and requirements of the physician, relating to the treatment or care of the disease or injury, and if he does not do so, and injurious consequences, affecting the disease or injury, result from his failure so to do, he cannot recover of the physician or surgeon, alleging a want of skillfulness on the part of the physician or surgeon. *Gramm vs. Boener*, 56 Ind., 497; *Geiselman vs. Scott*, 25 Ohio St., 86.

The jury are further instructed, that it is the duty of a patient to co-operate with his physician or surgeon, and to conform to all reasonably necessary prescriptions and directions, regarding the care or treatment of the disease or injury; and if he will not, or if, under the pressure of pain, he cannot, then he cannot hold his surgeon responsible for any injurious consequences arising from his failure to obey such prescriptions or instructions, if any such is shown by the evidence. 1 Hill. on Torts, 225.

If the jury find, from the evidence, that the defendant directed the plaintiff to observe absolute rest as a part of the treatment of the injury in question, and that that direction was such as a surgeon or physician of ordinary skill would adopt or sanction, and further, that the plaintiff negligently failed to observe such direction, or purposely disregarded the same, and that such neglect or disobedience directly contributed to the injuries of which the plaintiff complains, then he cannot recover in this action, although the jury may believe, from the evidence, that the defendant's negligence or want of skill also contributed to such injuries. *Geiselman vs. Scott*, 25 Ohio St., 86.

§ 3. **Burden of Proof.**—The jury are instructed, that the plaintiff, in this case, is bound to prove, by a preponderance of evidence, some one or more of the charges of negligence contained in the declaration, and that these charges relate to the setting or reducing the fracture of the plaintiff's leg, and also to the subsequent treatment thereof; and unless the plaintiff has proved, by a preponderance of evidence, that the

leg was not properly set in the first instance, or that the subsequent treatment of the leg by the defendant was unskillful and improper, to such an extent as to show want of ordinary skill, care, or attention to said leg, then it will be the duty of the jury to render a verdict for the defendant. *Kendall vs. Brown*, 86 Ill., 387; *Holtzman vs. Hoy*, 8 N. E. Rep., 832.

Although the jury may believe, from the evidence, that the plaintiff's leg became shortened in consequence of the fracture, or during the course of treatment subsequent to the fracture, still the defendant is not liable in damages therefor, unless the shortening was due to the want of reasonable and ordinary care and skill on his part; and if the jury further believe, from the evidence, that the extension of the limb could not well and safely be effected, nor the means and appliances for that purpose be safely used, before the time for bony union to commence, and that bony union, under proper treatment, would not, and did not commence before the defendant was discharged, and the plaintiff placed under the charge of another surgeon, then the defendant would not be liable in damages resulting from the shortening of the limb. *Kendall vs. Brown*, 74 Ill. 232.

In a suit against a surgeon for malpractice in treating an injury, the plaintiff is not entitled to recover anything on account of the pain and suffering caused by the injury, but only for such additional pain, suffering and injury as is produced by the negligence or want of skill of the defendant in the treatment. *Wenger vs. Calder*, 78 Ill., 275.

CHAPTER XXX.

MARRIED WOMEN.

- SEC. 1. May own, manage and convey her property.
2. May employ her husband as her agent.
3. When liable for repairs on house.
4. May ratify the acts of her husband.
5. Husband may give to wife, when.
6. When the proceeds of the farm belong to the husband.
7. What is not her separate estate as to husband's creditors.
8. Wife may give her property to her husband.
9. Husband entitled to the earnings of minor children.
10. Work and labor of married women—Illinois.

NOTE.—The following instructions, relating to the rights and powers of married women, are mostly adapted to the laws of those states where the common law disabilities of married women have been removed or greatly modified by statute. These laws vary greatly in the different states, and this fact must be borne in mind.

§ 1. **She may Own, Manage or Convey.**—The court instructs the jury, that by the laws of this state a married woman may own, in her own right, real or personal property obtained by descent, gift or purchase, and she may manage, sell and convey the same to the same extent and in the same manner that her husband can property belonging to him.

Since the year 18— the husband does not, by marriage, acquire title to the money or property of the wife, but she retains all her rights of property, and may deal with the same as if she was unmarried. And money loaned by the wife to the husband since the statute of 18—, whether loaned before or after marriage, is a proper personal charge against him while living, and against his estate after his death. *Whitford vs. Daggett*, 84 Ill., 144; *Vail et al. vs. Mayer*, 71 Ind., 159.

The products of the land of a married woman, the rents of her real estate, the increase from her stock, the interest on her money, are all hers, as absolutely as the capital or things from which they arise.

The fact that a crop is raised on the land of a wife, under the supervision of her husband, he contributing some personal labor in controlling and managing the business, will not make the crop his, or subject it to the payment of his debts. *Bongard vs. Core*, 82 Ill., 19; *Montgomery vs. Hickman*, 62 Ind., 598; *Hamilton vs. Boothe*, 55 Miss., 60.

§ 2. **May Employ Husband as Agent.**—Under the laws of this state, a married woman owning either real or personal property, in her own right, may employ her husband as her agent to transact the business growing out of or relating to such property, without thereby subjecting the property to the payment of the husband's debts. *Olsen vs. Kern*, 10 Ill. App., 578.

Although the jury may believe, from the evidence, that the plaintiff, in the management of her farm, availed herself of the services of her husband as her agent, and that he, from time to time, bestowed a portion of his time and labor in such management, still this alone would not subject the farm of the plaintiff, or the proceeds thereof, to the payment of the husband's debts. *Wells vs. Smith*, 54 Gar., 262.

If the jury believe, from the evidence, that during the season of 18— the plaintiff was the owner of a farm, and raised the property in question thereon, and that the husband assisted in raising the same, still, if the jury further believe, from the evidence, that in what the husband did he was simply acting as the agent of his wife, then the property so raised would be the property of the wife and not of the husband.

The fact, if proved, that the husband uses and enjoys the separate property of his wife, and out of it procures the means to support his family, does not render such property liable for the debts of the husband. *Blood vs. Barnes*, 79 Ill., 437.

The fact, if proved, that a married woman allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests, and the proper enjoyment of it by both, will not make it liable for his debts, or entitle his administrator to claim the same. *Primmer vs. Clabaugh*, 78 Ill., 94.

A husband may act as the agent of his wife in the manage-

ment and control of her personal property, either generally or specially, and if the property is in fact the property of the wife, then such control and management does not alter the title to the property or render it liable for the debts of the husband. And, in this case, if the jury believe, from the evidence, that the property was in fact the property of Mrs. G., then the fact, if proved, that her husband did control and manage it, will not make it liable for his debts. *Brownwell vs. Dixon*, 37 Ill., 197; *Rankin vs. West*, 25 Mich., 195.

When a married woman has money, or separate property in her own right, her husband may act as her agent for the control of her property or the investment of her funds. He may lease her property and collect the rents, or invest her money, or change the character of her investments, if authorized by her, without subjecting her property to the payment of his debts. *Wortman vs. Price*, 47 Ill., 22; *Abbey vs. Dego*, 44 Barb., 374; *Buckley vs. Wells*, 33 N. Y., 518; *Welch vs. Kline*, 57 Penn., 428; *Cooper vs. Hare*, 49 Ind., 394; *Fuller vs. Alden*, 23 Wis., 301.

§ 3. **When Liable for Repairs on House.**—And, in this case, if the jury believe, from the evidence, that the defendant employed the plaintiff to perform the labor, or made a contract with him to furnish the material for the improvement of the house in question, and that at the time she did so she was in the possession of the property, and then claimed and represented to the plaintiff that she was the owner of it, and, further, that the plaintiff believed such representations, and, relying upon them, afterwards went on and performed the labor and furnished the material for which this suit is brought, then the defendant is estopped from denying that she was the owner of the property, and for all purposes of this suit she must be regarded as the owner of the property.

§ 4. **May Ratify the Act of a Husband.**—In order that a married woman shall be bound by the acts of her husband in selling or exchanging her property, it is not necessary that she should expressly authorize him beforehand thus to act—she may ratify the act afterwards. And, in this case, if the jury

believe, from the evidence, that the husband of plaintiff exchanged the mule in question with the defendant for a mare of the defendant's, either as his own property, or acting as the agent of the complainant, and that at or about the time of the trade, the complainant knew that her husband had so traded, and she did not, as soon as it could reasonably be done, repudiate the act of her husband, nor claim the property, then she must be deemed to have ratified the act of the husband in making the exchange, and she cannot now recover the property on the ground that she did not authorize the trade or did not know the law. *Lichtenberger vs. Graham*, 50 Ind., 288.

§ 5. **Husband May Give to Wife, When.**—A husband out of debt, or when it does not injure existing creditors, may settle property on his wife, either by having it conveyed directly to her, or to another in trust for her, and subsequent creditors cannot reach it, and the money in question, if the jury believe, from the evidence, that it was realized from the sale of such property, will be hers. *Lincoln vs. McLaughlin*, 74 Ill., 11.

§ 6. **When Proceeds of her Farm Belong to Husband.**—The court instructs the jury, that although they may believe, from the evidence, that the farm on which the wheat in dispute was grown, was owned by the plaintiff, still, if they further believe, from the evidence, that the plaintiff's husband, in his own right, by his own labor, and that of his minor son or sons, took care of and raised the crops grown thereon, then such crops would be liable to an execution against him.

The court further instructs the jury, that although they believe, from the evidence, that the farm on which the wheat in controversy was raised, was in fact owned by the plaintiff, still, if they further believe, from the evidence, that her husband was allowed by her to exercise full and complete authority over said farm—to raise, sell and dispose of the products of said farm in his own name, and for his own benefit, and that the grain in question was raised by the labor of the husband and men in his employ, assisted by his minor sons, then she would be estopped from denying that her husband had an interest in the crops so raised and grown on said farm, under

his supervision, and by the exertions of himself, the men in his employ, and his minor son or sons.

If a married woman places her money or property in the hands of her husband for the purpose of enabling him to carry on a general business, under such circumstances as to enable him to obtain credit on the faith of his being the owner of such money or property, and he does thereby obtain credit, then the entire capital so embarked in business, with the increase thereof, will be liable for the husband's debts. *Patton vs. Gates*, 67 Ill., 164; *Wilson vs. Loomis*, 55 Ill., 352.

When the husband, as the head of the family, occupies and cultivates the land of his wife, in his own name, then he is considered in law as occupying the farm, with her consent, for the common benefit of the family. And the proceeds of his toil upon such land are as much his property as though he had occupied the land as a tenant, and had rented from some other person. *Stennett vs. Bradley*, 35 N. W. Rep., 467.

§ 7. What Not Separate Estate as to Creditors of Husband.—The jury are instructed, that in determining the issues in this case, they may take into consideration, together with all the other evidence in the case, the circumstances attending the management and use of the property in question, before and at the time the same was taken on the (*execution*), introduced in evidence by the defendant, so far as those circumstances appear in evidence; and if, from all the evidence in the case, the jury believe that there was a collusive arrangement or understanding between the plaintiff and her husband, that the said business should be carried on, in the name of the plaintiff, by the husband for his own use and benefit, and further, that at the time the said property was taken, the business was carried on in the name of the plaintiff, under such arrangement, by her husband, for his use and benefit, then such conduct on the part of the plaintiff was fraudulent and unlawful, as against the creditors of the husband, and the jury should find that the property belonged to the husband.

The jury are instructed, that although they may believe, from the evidence, that the plaintiff furnished the funds with which the said goods were purchased and said business carried on, at the time said property was taken, still, if the jury

further believe, from the evidence, that the funds so furnished by the plaintiff, were placed in the hands of her husband for the purpose of enabling him to carry on said business, for his use and benefit, and that he was the sole manager thereof, and that his skill and labor was devoted to carrying on said business, without any agreement or arrangement as to his salary or compensation, then the jury are instructed, that the entire capital used in said trade or business, together with the increase thereof, cannot be considered the separate estate of the plaintiff, but the same became liable for the debts of her husband, and the property was subject to the execution offered in evidence by the defendants.

Although the jury may believe, from the evidence, that when the property in question was taken by the officer, the business at the store, etc, was being conducted and carried on in the name of the plaintiff, and that her husband claimed to be acting only as the agent of the plaintiff, still, if the jury also believe, from the evidence, that, with plaintiff's knowledge and consent, the use of her name in carrying on said business was only for the purpose of protecting the property of her husband from his creditors, or was with the intent, on her part, to secure to him some right in the property, to the prejudice of his creditors, then the jury are instructed, that such conduct, on the part of the plaintiff, was fraudulent as to such creditors, and the verdict of the jury should be for the defendant.

The court instructs the jury, as a matter of law, that if the wife advance her own separate property or money, and place the same in the hands of her husband, for the purpose of enabling him to carry on any general trade or business, for his use and benefit, and the husband engages in such business, and, by his labor and skill, increases the property or funds while in his hands, then the entire capital embarked in the enterprise, together with the increase, will not constitute the separate estate of the wife, but they will be liable for the debts of the husband. *Robinson vs. Breems*, 90 Ill., 351.

If the jury believe, from the evidence, that the property in question really belonged to the defendant in the execution, but was claimed and called the property of his wife, for the purpose of covering up said goods, and keeping them from the

creditors of her husband, then the jury should find for the defendant. *Brownwell vs. Dixon*, 37 Ill., 197.

If the jury believe, from the evidence, that before and at the time that the property in question was taken by the officer, it was in the possession of the husband of the plaintiff, and under his exclusive control, then the jury are instructed, that the fact, if proved, that the plaintiff received the property from her father at the time of her marriage, or that it was bought with money received from her father's estate, is not alone sufficient to entitle her to hold the property against the creditors of her husband; the jury must further believe, from the evidence, that she so received the property (*or money*) since the — day of, etc.

§ 8. **Wife may Give Property to Her Husband.**—The court instructs the jury, that although they may believe, from the evidence, that the notes or the money with which the property in question was bought, was given to Mrs. G., and was originally hers, still, if the jury further believe, from the evidence, that Mrs. G. afterwards gave the said notes or money to her husband to trade upon, or lay out as he saw fit, and that he, with the said notes or money, bought the property in question in his own name, without any understanding that the property should be hers, then the property became the property of the husband, as far as his creditors are concerned, and was liable to the executions against him.

§ 9. **Husband Entitled to Earnings of Minor Children.**—The court instructs the jury, that the father is entitled to all the earnings of his minor children until they become of age. And so long as the father lives and resides with his family, he is entitled to the earnings or wages of his minor children.

§ 10. **Work and Labor by Married Women—Illinois.**—The court instructs the jury, that a married woman has the right to sue for and recover for her personal labor, performed for persons other than her husband, the same as if she were unmarried; provided, the work is done under a contract, expressed or implied, made with her and not with her husband.

Where a married woman performs work and labor for a

person, not her husband, under a contract, expressed or implied, made with her, her husband has no legal right to collect her wages, except by her authority, or with her consent; and a payment to her husband in such a case, without her authority or consent, will be no defense to an action brought by her to recover such wages.

If the jury believe, from the evidence, that the plaintiff performed work and labor for the defendant under a contract, either expressed or implied, made by her and that she has not been paid therefor, then the jury should find for the plaintiff, although they may believe, from the evidence, that the husband has been paid for the same; if they further believe, from the evidence, that such payment was made without her consent, and the burden of proving such consent is on the defendant.

The jury are further instructed, that they have no right to presume that the husband had a right to collect or settle for his wife's wages for labor performed by her under a contract made by herself, simply from the fact of the relation of husband and wife existing between them, or from the fact of their living and cohabiting together, as husband and wife, at the time.

If the jury believe, from the evidence, that the plaintiff actually performed the services, for which this suit is brought, for the defendant, and that at that time she had no knowledge of any contract between her husband and the defendant in relation to such services, or the mode of payment therefor, then she would not be bound by any such contract, even if the same has been proved.

While it is the law, in this state, that a married woman may receive and sue for her own earnings in her own name, yet this rule only applies when the married woman performs such labor under a contract, made by herself, either expressed or implied, with the person for whom the labor is performed.

If a husband contracts with a person, at a fixed price, for the services of himself and wife, and the wife, under such contract, knowingly labors with her husband to carry out this contract, then she cannot sue for the recovery of services so rendered.

If the jury believe, from the evidence, that the husband of

the plaintiff made a contract with the defendant for the services of himself and wife, for the time in question, and that the plaintiff, to carry out this contract of her husband, performed the services for which this suit is brought, then such a contract would be the contract of the husband, and the plaintiff cannot recover for such services.

Although the jury may believe, from the evidence, that the plaintiff performed the services in question, under a contract made by herself, still, if the jury further believe, from the evidence, that her husband, before the commencement of this suit, received pay for such services, with the knowledge and consent of the plaintiff, such payment is as effectual for all purposes as if made to herself, and she cannot recover in this suit.

CHAPTER XXXI.

MEASURE OF DAMAGES.

- SEC. 1. Death from negligent act.
2. Death from intoxication—Suit by widow.
3. Exemplary damages.
4. Damages from intoxication, other than by death.
5. Personal injury.
6. Exemplary damages—In tort generally.
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34. Damages, how determined.
35. Exemplary damages in trespass.
36. Exemplary damages defined.
37. Malicious prosecution.
38. Damages in trespass or false imprisonment.

§ 1. **Death from Negligent Act.**—If the jury should find, from the evidence, that the defendant is guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the death of A., then the plaintiff is entitled to recover in this action for the benefit of the (*widow and next of kin of such deceased*) such damages as the jury may deem, from the evidence and proofs, a fair and just compensation therefor, having reference only to the pecuniary injuries resulting from such death, to such widow and next of kin, not exceeding the amount claimed in the declaration. *Cooley on Torts*, 270; *C., B. & Q. Rd. Co. vs. Payne, Adm.*, 59 Ill., 534; *Rafferty vs. Buckman*, 46 Ia., 195; *Steel, etc., vs. Kurtz*, 28 Ohio St., 191.

If you find, from the evidence, under the instruction of the court, that the defendant is guilty of the wrongful act, neglect or default, charged in the declaration in this suit, and that the same resulted in the death of the deceased, and that the plaintiff is entitled to a verdict, then the plaintiff is entitled to recover, for the benefit of the widow and next of kin, such an amount as damages as you believe, from the evidence, a just and fair compensation to such widow and next of kin, having reference only to their pecuniary loss, resulting from such death. *C., B. & Q. Rd. Co. vs. Payne*, 59 Ill., 534; *C., M. & St. P. R. R. vs.* 115 Ill., 659; *Penn Co. vs. Marshall*, 119 Ill., 399.

The jury are instructed, that in estimating the pecuniary injury which the widow and children of the deceased have sustained by his death, if the jury believe, from the evidence, that they have sustained any injury for which the defendant is liable, as explained in these instructions, then the jury have a right to take into consideration the support of the said widow and minor children, and the instruction and physical, moral and intellectual training, as well as the ages of the said minor children, so far as these matters have been proved, in determining the amount of damages in this case. *I. C. Rd. Co. vs. Welden*, 52 Ill., 290; *Tilley vs. H. R. Rd. Co.*, 29 N. Y., 252; *Costello vs. Landwehr*, 28 Wis., 522.

The pecuniary circumstances of the widow and children, whether they are rich or poor, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in

this suit; and in case the jury find the issues for the plaintiff, in assessing the damages which the plaintiff is entitled to recover, the jury should disregard all testimony and statements of the counsel, as to the pecuniary circumstances of the widow and children. *C. & N. W. Rd. Co. vs. Bayfield*, 37 Mich., 205.

If you believe, from the evidence, that the widow of the deceased, at the time of his death, and since, by reason of ill-health, has been unable to perform labor to support herself and family, this fact cannot increase or diminish the amount which she is entitled to recover in this suit; and if you should find the issues for the plaintiff, then you are instructed, in the assessment of damages, to disregard all the testimony in the case as to such ill-health. *I. C. Rd. Co. vs. Baches*, 55 Ill., 379.

In this case, if you find for the plaintiff, you can only allow such damages as will make good the pecuniary loss sustained by the person for whose use this suit is brought. The mental sufferings, or grief of survivors, or loss of domestic or social happiness, or the degree of culpability of the defendant, are not proper elements in the calculation of damages. You can not award exemplary or vindictive damages; you must ascertain, from the evidence, the pecuniary loss sustained in dollars and cents, as nearly as you can approximate thereto, and make that good. *Kansas Pacific Ry. Co. vs. Cutter*, 19 Kan., 83; *Blake vs. Midland, etc., Rd. Co.*, 18 Q. B. 93; *Oakland & Co. vs. Fielding*, 48 Penn., 320; *Donaldson vs. Miss., etc., Co.*, 18 Ia., 280.

The jury must found their estimate of the amount of such loss upon such facts in proof as tend to show the extent of the pecuniary loss sustained, taking into consideration the age of the deceased, and all such other evidence as may afford them the means of making the estimate. *City of Chicago vs. Major*, 18 Ill., 349.

NOTE.—Where the statute limits the recovery the instructions may conform to the statute.

If, under the evidence and the instruction of the court, the jury find the defendant guilty, then in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the

wife and children of the deceased, having regard to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance during what would probably have been his lifetime if he had not been killed, so far as these several matters have been shown by the testimony, and also having regard to the value of his services in the superintendence, attention to and care of his family, and the education of his children, of which they have been deprived by his death, not exceeding, however, \$——. *Baltimore, etc., Rd. Co. vs. Wightman*, 29 Gratt., 431; *Mathews vs. Warner*, 29 Gratt., 570.

If, under the evidence and the instructions of the court, you find the defendant guilty, and that the plaintiff has sustained any pecuniary loss from the death of her husband, then, in assessing the amount of such damages, the jury should estimate the same with reference to the fact that it is the legal duty of the husband to provide the wife present support and maintenance in the future, and she is entitled to such a sum as will make her whole in a pecuniary point of view, having reference to the pecuniary advantage which the jury believe, from the evidence, she might reasonably have expected from the continuance of the life of her husband if he had not been killed by the accident in question, not exceeding, however, the sum of \$——. *Rafferty vs. Buckman*, 46 Ia., 195; *Nashville, etc., Rd. Co. vs. Stevens*, 9 Heisk., 12.

§ 2. **Death from Intoxication—Suit by Widow.**—If the jury find, from the evidence, under the instructions of the court, that the defendants, or either of them, are guilty, as charged in the declaration, and that the plaintiff has suffered actual damages, then it will be the duty of the jury to assess the amount of such actual damages; and if the jury further believe, from the evidence, that there were any willful, wanton and aggravating circumstances attending the sale of said intoxicating liquors, then the jury may, in addition to such actual damages, find such further exemplary damages as they shall deem proper, not to exceed in amount the sum of \$——, demanded in the declaration.

The court instructs the jury, that in a suit by a wife for injury to her means of support, caused by selling liquor to her

husband, she cannot recover exemplary damages, unless the jury find, from the evidence, that she has sustained actual damages. *Graham vs. Fulford*, 93 Ill., 596; *Gilmore vs. Mathews*, 67 Me., 517.

That in estimating the actual damages which the plaintiff has sustained, the jury should not take into consideration any mortification to her feelings, or mental suffering on her part; in estimating the actual damage, the jury can only consider the pecuniary loss, if any, which she has sustained, as shown by the evidence, but no allowance can be made for the grief or bereavement of surviving relatives. *Brantigan vs. White*, 73 Ill., 561; *Kans. P. Rd. Co. vs. Cutler*, 19 Kans., 83; *Huntingden Rd. Co. vs. Decker*, 84 Penn. St., 419; *March vs. Walker*, 48 Texas, 372.

In case the jury find the defendants guilty, then, in estimating the amount of actual damages which the plaintiff has sustained, if any, the jury should not take into account the anguish or pain of mind, or feelings, suffered by the plaintiff by reason of her husband's death; nor should they allow anything for the support and maintenance of the children, or for any loss which they may have sustained by the death of their father.

§ 3. **Exemplary Damages.**—Although the jury may, in this class of cases, give exemplary damages if they find the defendant guilty, and further find, from the evidence, that the plaintiff has sustained any actual damages, yet the jury cannot give any damages by way of punishment to the defendant, unless they believe, from the evidence, that the plaintiff has sustained some actual pecuniary damages; nor should they give exemplary damages, unless they find, from the evidence, some circumstances of aggravation in connection with the conduct of the defendants (*or some of them*) calling for such damages. *Bates vs. Davis*, 76 Ill., 222; *Meidel vs. Anthis*, 71 Ill., 241.

If, under the evidence and the instruction of the court, the jury find the defendant guilty, and they further believe, from the evidence, that the plaintiff B. has suffered any pecuniary loss in her means of support in consequence of, etc., then if you further believe, from the evidence, that she has been excluded from society on account of her husband's habits of intoxication, and that such intoxication has been in part pro-

duced by, etc., or that she has suffered mental anguish and shame on account of his drunkenness, and that this has been caused in whole or part by, etc., then these facts may be taken into account, in determining whether or not, you should give exemplary damages. *Friend vs. Dunks*, 37 Mich., 25; See *Brownford vs. Swineford*, 44 Wis., 282; *Boyer vs. Barr*, 8 Neb., 68.

NOTE.—In Michigan it has been held that the foundation of the exemplary damages rests upon the wrong, done willfully or wantonly, to the complaining party herself. *Gunsley vs. Perkins*, 30 Mich., 492. Under the Iowa Statute it has been held that the allowance of exemplary damages rests entirely in the discretion of the jury, and they are not limited to cases of tort. *Goodenough vs. McCrew*, 44 Ia., 670. In Indiana it has been held that exemplary damages cannot be given in any case where the sale is made under circumstances rendering it a penal offense. *Koerner vs. Oberly*, 56 Ind., 284.

§ 4. **Damages from Intoxication Other than by Death.**—If you believe, from the evidence, that the husband of the plaintiff before his death was in such circumstances that the plaintiff, as his wife, required the proceeds, or a part of the proceeds, of his daily labor for her support, then she was entitled to this support out of his daily labor; and if you further believe, from the evidence, that while she was entitled to such support the defendant sold him intoxicating liquors from time to time which caused his intoxication (or contributed to such intoxication) and that the plaintiff was thereby deprived of her means of support in whole or in part, then the defendant would be liable to respond in damages to the amount of the support he so deprived her of. *Schneider vs. Hosier*, 11 Ohio St., 98.

Every man who has a wife owes her maintenance and support, and if his only means of affording such support is out of his daily labor, then, if a person sell him intoxicating drinks so as to produce intoxication and thereby renders him unfit for labor and prevents him from pursuing his only means for the support of his wife, such person is liable to the wife for the loss thus sustained by her. *Ibid.*

§ 5. **Personal Injury.**—The jury are further instructed, that if, under the evidence and the instructions of the court, they find the defendant guilty, then, in estimating the plaintiff's

damages, if any are proved, they have a right to take into consideration the personal injury inflicted upon the plaintiff—the pain and suffering undergone by him in consequence of his injuries, if any are proved, and also any permanent injury sustained by him, if the jury believe, from the evidence, that the plaintiff has sustained such permanent injury from the wrongful acts complained of. *Collins et ux. vs. The City, etc.*, 32 Ia., 324; *Holbrook et al. vs. The U. & S. Rd. Co.*, 2 Kern., 236; *Steamer N. W. vs. King*, 16 How., 472; *Russ et ux. vs. Steamboat War Eagle*, 14 Ia., 363.

If, under the evidence and instructions of the court, the jury find the defendant guilty, then, in assessing the plaintiff's damages, the jury may take into consideration not only the loss, expenses and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received. *Indianapolis vs. Gaston*, 58 Ind., 224; *Morris vs. Chicago, etc., R. R. Co.*, 45 Ia., 29.

The jury are instructed, that if they find the defendant guilty, under the testimony and instructions of the court, then in assessing the plaintiff's damages, the jury may take into consideration not only the bodily disability occasioned by the accident, if any is proved, but also any impairment of plaintiff's mental faculties and general health, if any such is proved, and which the jury believe, from the evidence, will affect or impair his future ability to attend to his ordinary business the same as if the injury complained of had not occurred. *Ill. Cent. Rd. Co. vs. Reed*, 37 Ill., 484; *Morris vs. C., B. & Q. Ry. Co.*, 45 Ia., 29.

If the jury believe, from the evidence, that the plaintiff has been injured in health of body or strength of limb, or in his ability to labor and attend to his affairs, and generally pursue the course of life as he might otherwise have done, as well since as before the accident, and if the jury further believe, from the evidence, that such injuries were inflicted upon him through the negligence or carelessness of defendant's servants or employes, as charged in the declaration, and that the plaintiff

was at the time exercising all reasonable care and caution to avoid such injuries, then the jury may assess such damages as will recompense to the plaintiff all the loss he may have sustained, as a necessary result of such injuries, as shown by the evidence. *Indianapolis vs. Gaston*, 58 Ind., 224.

If, under the evidence and instructions of the court, the jury find the defendant guilty, then, in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in future upon the plaintiff's health, if they believe, from the evidence, that his future health will be affected by the injury in question; and also the use of his hand, and his ability to attend to his affairs generally, in pursuing his ordinary trade or calling, if the evidence shows that these will be affected in the future; and also the bodily pain and suffering, the necessary expenses of nursing and medical care and attendance, and loss of time, so far as these are shown by the evidence; and all damage, present or future, which, from the evidence, can be treated as the necessary result of the injury complained of. *Ill. Cent. Rd. Co. vs. Reed*, 37 Ill., 484; *Whalen vs. St. Louis, etc., Rd. Co.*, 60 Mo., 323.

In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them; the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case; her suffering in body and mind, if any, resulting from such injuries; and also such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in this case, she has sustained or will sustain by reason of such injuries. *H. & St. J. R. R. Co. vs. Martin*, 111 Ill., 227; *C., B. & Q. R. R. vs. Warner*, 108 Ill., 545.

If the jury believe, from the evidence, under the instruction of the court, that the plaintiff is entitled to recover, then, in fixing the damages which he ought to recover, the jury should take into consideration all the circumstances surrounding the case, so far as these are shown by the evidence, such as the circumstances attending the injury; the loss of time of the plaintiff, if any, occasioned by the injury; the pain he has suffered, if any; the money he has expended, if any, to be cured

of such injury; the business he was engaged in, if any, at the time he was injured, and the extent and duration of the injury, and give the plaintiff such damages as the jury believe, from the evidence, he has sustained. Sedg. on Meas. of Damages, 618; *C., R. I. & P. Rd. Co. vs. Otto*, 52 Ill., 416; *Little vs. Tingle*, 26 Ind., 168.

§ 6. **Exemplary Damages—In Tort Generally.**—The jury are instructed, that in actions of this kind, if the jury find the defendant guilty, under the evidence and instructions of the court, and if they further find, from the evidence, that the injury complained of was inflicted willfully or maliciously, and that the plaintiff has sustained any actual damage thereby, then the jury, in assessing damages, are not limited to mere compensation for the actual damage sustained, but they may give him such further sum, by way of exemplary or vindictive damages, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like manner. *Pike vs. Dilling*, 48 Me., 539; *McWilliams vs. Bragg*, 3 Wis., 424; *Dibble vs. Morris*, 26 Conn., 416; *Ousley vs. Har- din*, 23 Ill., 403.

§ 7. **Assault.**—If the jury believe, from the evidence, under the instruction of the court, that the plaintiff is entitled to recover in this case, then, in assessing his damages, the jury are at liberty to take into account the extent of plaintiff's injuries, so far as they have been shown by the evidence—the pain and suffering endured by him, if any, in consequence of such injuries, his loss of time, and the costs of medical attendance, if such loss of time and costs have been proved, and award such damages as the jury may think proper and right, in view of all the facts and circumstances proved on the trial.

§ 8. **Exemplary Damages in Assault.**—The jury are further instructed, that if, under the evidence and the instruction of the court, they find the defendants, or any of them, guilty of assault and battery, and that such assault and battery was unprovoked by the plaintiff, and was maliciously, willfully and wantonly committed on the plaintiff, and that the plaintiff was

seriously injured and damaged thereby, then the jury in fixing the amount of the plaintiff's damages are not confined to the actual damage proved, but they may give, in addition thereto, such exemplary damages or smart money, as, in their judgment, will be just and proper, as a punishment to the defendant, in view of all the facts and circumstances proved on the trial.

If the defendant, without provocation, assaulted and beat the plaintiff, as charged in the declaration, and that such assault was a malicious, wanton and aggravated one; and if the jury further believe, from the evidence, that justice and the public good require it, then the law is, that the jury are not confined in their verdict to the actual damages proven, but they may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses. *Bradshaw vs. Buchanan*, 50 Tex., 492; *Titus vs. Corkins*, 21 Kans., 722; *Brown vs. Swineford*, 44 Wis., 282.

While the jury are not authorized by law to give exemplary or punitive damages in this case in the event a verdict is found for the plaintiff, yet, if the jury find for the plaintiff, full compensatory damages should be awarded; and, in arriving at compensatory damages, the jury are not necessarily restricted to the naked pecuniary loss; for, besides damages for pecuniary loss or injury, the jury may allow such damages as are the direct consequence of the act complained of, for injury to the plaintiff's good repute, her social position, for physical suffering, bodily pain, anguish of mind, sense of shame, humiliation and loss of honor. *Wolf vs. Trinkle*, 103 Ind., 355; 3 N. E. Rep., 110.

§ 9. **Aggravation of Damages.**—That, in an action of assault and battery, the insult and indignity inflicted upon a person, by giving him a blow with anger, rudeness or insolence, constitute an element of damages. And in this case, if the jury believe, from the evidence, that the defendant committed an assault upon the plaintiff, as charged in the declaration, then the jury, in assessing damages, may consider, as an aggravation of the wrong, the mental suffering and mortification of feeling of the plaintiff, arising from the insult and indignity of the defendant's blow. *Elliott vs. Van Buren*, 33 Mich., 49.

§ 10. **Mitigation of Damages.**—The jury are instructed, that while angry and threatening words, and abusive language, are no justification for an assault and battery, still they may be considered by the jury in mitigation of damages, if it appears from the evidence that they were used, and were of such a character as would naturally tend to excite the angry passions of men, and were spoken so recently before the assault complained of as that the hot blood and passion which they were calculated to excite had not had time to cool. *Thrall vs. Knapp*, 17 Ia., 468; *Fullerton vs. Warrick*, 3 Blackf., 219.

§ 11. **Exemplary Damages not Allowed, When.**—Though the jury should believe, from the evidence, that the defendants, or some of them, committed the trespasses complained of, still, if the jury further believe, from the evidence, that such defendant or defendants believed that in so doing they were only asserting what they deemed to be a legal right, and did not act oppressively, wantonly or maliciously, then the jury should only assess such sum as damages as they believe, from the evidence, the plaintiff has actually sustained.

While intoxication, of itself, is no excuse for an unlawful act committed while under its influence, still it may be considered by the jury in its bearing upon the question of damages. And, in this case, if the jury believe, from the evidence, that an assault was committed by defendant, as charged, still, if they further believe, from the evidence, that the defendant was so intoxicated at the time that he did not know and realize what he was doing, and that when not under the influence of intoxication the defendant is a quiet and peaceable citizen, then these facts may be considered by the jury, with all the other evidence in the case, in determining whether he ought to be made to pay smart money, over and above the actual damages proved.

§ 12. **Landlord and Tenant—Premises not Occupied—No Rent Paid.**—The court instructs the jury, that if they believe, from the evidence, under the instructions of the court, that the plaintiff has a right to recover; and if the jury further believe, from the evidence, that the plaintiff has paid no rent for the premises in controversy, then the measure of damages will be

the difference between the rent agreed to be paid for the use of the land and the real value of the use of the land, as shown by the evidence.

The court further instructs the jury, that the rent agreed to be paid for the use of the land, as fixed in the lease, is presumed to be the true value of the use of said premises, unless the evidence shows it to be otherwise; and the agreed price must be taken by the jury as the true rental value of the premises, for the purposes of this suit, unless the jury believe, from the evidence, that the true rental value is more than the price agreed to be paid therefor by the plaintiff.

The measure of damages, in a case of this kind, is the difference between the price agreed to be paid for the use of the premises, not occupied, and the actual rental value of the same premises, if they had been occupied, as stipulated in the lease; and unless the jury believe, from the evidence, that the actual value of the premises was more than the rent agreed to be paid therefor, then the plaintiff, in any event, is only entitled to recover nominal damages, and such special damage as the jury believe, from the evidence, the plaintiff has sustained by reason of, etc.

§ 13. **Suit on Replevin Bond.**—The jury are instructed, that although this action is in form an action of debt, for the sum of \$——, the penalty in the bond, the action is, in fact, an action to recover for the damages alleged to have been sustained by the plaintiff, by reason of the property mentioned in said bond not having been returned to the defendant in the replevin suit, according to the condition of the bond.

And if the jury find the issues for the plaintiff, they should, by their verdict, find both the debt and the amount of the damages; the debt will be \$——, the penalty mentioned in the bond, while the damages will be such an amount as the evidence shows the parties, for whose use this suit is brought, have sustained by reason of the non-return of said property, according to the condition of said bond.

The jury are instructed, that if they find, from the evidence, under the instructions of the court, that the plaintiff is entitled to a verdict, and that the parties for whose use the suit is brought have sustained damage, as alleged, then it will be the

duty of the jury to assess the amount of such damages; and if the jury further believe, from the evidence, that the said T. M. B. was sheriff of this county at the time the said property was taken, and that the said sheriff was then holding the said property, under, and by virtue of, a writ of attachment in favor of the other defendants in the replevin suit, for an indebtedness claimed to be due to them by one J. F., and that a judgment was afterwards rendered in said attachment suit for the sum of (*four thousand*) dollars, in favor of the plaintiffs in that suit, then the measure of damages in this case is the said sum of (*four thousand*) dollars, and interest thereon, at the rate of six per cent. per annum, since the date of said judgment, and the further sum of (*twenty*) dollars, defendant's costs in the said replevin suit; provided, however, that if the jury believe, from the evidence, that the value of the property taken by the said J. E., in the replevin suit, was worth less than the amount of said judgment, interest and costs, then the measure of damages, in this suit, will be the value of such property, as shown by the evidence, and no more. Sedg. on the Meas. of Dam., 585; *Jennings vs. Johnson*, 17 Ohio, 154; *Noble vs. Epperly*, 6 Ind., 468; *Hayden vs. Anderson*, 17 Ia., 158.

The court instructs the jury, that if you find the issues for the plaintiff, and believe, from the evidence, that the property in question was the property of E. L. W., the defendant in the execution, at the time it was taken by the sheriff, then in estimating the amount of damages in this suit, you should ascertain the amount remaining unpaid upon the judgment in the case of J. G. vs. the said E. L. W., for principal, interest and costs, as shown by the evidence, calculating interest at the rate of six per cent. per annum, from the date of said judgment; and then, if you believe, from the evidence, that the amount thus found to be due upon the judgment is less than the value of the property in question, you will find as damages, in this case, the sum remaining due upon said judgment, as shown by the evidence.

On the other hand, if you find the amount remaining unpaid upon said judgment to be equal to or greater than the value of the property in question, then you will find as damages, in this suit, the value of said property as shown by the evidence, at the time it was taken from the sheriff, with interest thereon at the rate of six per cent. per annum.

§ 14. Libel.—If the jury believe, from the evidence, that the libel was published by the defendant, as charged in the declaration, then the plaintiff is entitled to recover. The amount of the recovery is to be determined by the jury, from a consideration of all the evidence and circumstances proved in the case; and in determining such amount, the jury will consider the character of the charge, the general reputation of the plaintiff at the time of the publication complained of, whether the defendants had an opportunity to retract the charge, whether it was maliciously made and persisted in, or whether made as public journalists and for laudable purposes and without malice, and all the facts proved in the case, having a reference to this subject. *Sheahan et al. vs. Collins*, 20 Ill., 325.

If the jury find the issues for the plaintiff, and believe, from the evidence, that the publication was made maliciously or wantonly, and under circumstances evincing a disregard of the rights of others, then, in making up their verdict, they may take into consideration the circumstances of the defendant as to wealth and possession of property, so far as these appear, from the evidence, and they may give a verdict for such sum as, from the evidence, they think the plaintiff ought to receive, and the defendant ought to pay, under all the circumstances of the case. *Hill. on Rem. for Torts*, 456; *Hunt vs. Bennett*, 19 N. Y., 173; *Knight vs. Foster*, 39 N. H., 576; *Humphries vs. Parker*, 52 Me., 502.

Although you may believe, from the evidence, that the alleged article is libelous and was published of and concerning the plaintiff, and that the defendant was guilty of its publication, still, if you further believe, from the evidence, that the plaintiff sustained no actual or substantial injury to his feelings, occupation or business thereby, and that the defendant was not actuated by malice, in fact, against the plaintiff, in the publication, then the plaintiff can only recover nominal damages.

The amount of damages in a case of this character, should you find that any ought to be allowed, depends upon the question of malice, express or implied, and you are to bear in mind that malice in law, which is presumed from the publication of a libelous article, means an absence of sufficient legal excuse

for such publication, and in such cases, if there was no malice, in fact, you can only assess compensatory damages—that is, such damages only as will compensate the plaintiff for the injury which you may believe, from the evidence, he has sustained.

The jury, if they find the defendant guilty, must exercise a sound discretion as to the amount of damages to be assessed for plaintiff, and in estimating them, the jury are entitled to consider the motives of the defendant, so far as they appear from the evidence, that is as to whether they were malevolent and show a settled, deliberate purpose to humiliate, injure or disgrace the plaintiff, and, if the jury so find, they may assess the damages at any amount, such as they may think will properly compensate the plaintiff and properly punish the defendant in view of all the circumstances proved on the trial.

§ 15. *Malpractice.*—If the jury find, under the evidence and the instructions of the court, that the plaintiff is entitled to recover, then, in fixing the amount of damages, they should take into account the present and future loss of the plaintiff's hand, if any such loss has been proved, as well as compensation for the pain and suffering endured by the plaintiff in consequence of the want of skill, care and diligence of the defendant——, as shown by the evidence, and as charged in the declaration, if the proof shows such loss and suffering was endured in consequence of the fault of the defendant.

§ 16. *Breach of Marriage Contract.*—The jury are instructed, that in assessing damages for the breach of a marriage contract, the general rule is, that the jury may take into consideration all the injury, which the evidence shows the plaintiff has sustained, and no more; and in this case, if the jury find the issues for the plaintiff, the jury may take into consideration the character and habits of the plaintiff, so far as they are proved by the evidence; and if the jury believe, from the evidence, that at the time of the alleged breach of contract, the plaintiff was addicted to lewdness, drunkenness, or to the use of profane language, then these circumstances should be considered by the jury in estimating the injuries sustained by her. *Sedg. on Meas. of Dam.*, 428; *Burnett vs. Simpkins*, 24 Ill., 264.

If the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and also that he did seduce her, then they have a right to determine, from all the facts and circumstances, whether such seduction was consequent upon the promise of marriage, and if they so find, then the seduction may be taken by the jury in aggravation of the damages in this case, provided they find for the plaintiff under the first (*or other appropriate*) count of the declaration.

In this suit, if the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and afterwards refused to carry out the same, as charged in the declaration, and further, that the defendant, under such promise of marriage, seduced the plaintiff and begot her with child, then that circumstance may be taken into account by the jury in estimating the plaintiff's damages. *Tubbs vs. Van Kleeck*, 12 Ill., 446; *Sheahan vs. Barry*, 27 Mich., 217; *Williams vs. Hollingsworth*, 6 Baxt. (Tenn.), 12; *Wilde vs. Bagan*, 57 Ind., 453.

If the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, within five years before the commencement of this suit, and that under the pretense of such promise of marriage, he seduced and got the plaintiff with child, and then neglected and refused to marry the plaintiff, these circumstances and such violation of faith may be taken into consideration by the jury in estimating the plaintiff's damages.

If the jury believe, from the evidence, that the defendant in this case has attempted to prove that the plaintiff was a lewd or base woman, and was of immoral or bad character, and that he has failed to establish and prove the same by a preponderance of evidence, and that such attempt was not made in good faith, or was made without any reasonable hope or expectation of establishing such facts, then such charge and failure on the part of the defendant may be taken in aggravation of the damages in this case; provided, the jury find the issues for the plaintiff. *Sedg. on Meas. of Dam.*, 427; *Fidler vs. McKinley* 21 Ill., 308; *Davis vs. Slagle*, 27 Mo., 600; *Denslow vs. Van Horn*, 16 Ia., 476.

The jury are instructed, that should they find for the

plaintiff, they alone are the judges of the amount of damages to be found, and in fixing the amount of such damages, the jury may take into consideration the length of time the parties were acquainted, the degree of intimacy existing between them, so far as proved, and all the injuries shown to have been sustained, whether they be from anguish of mind, blighted affections, or disappointed hopes, and fix the amount of such damages at such a sum as they think proper, under the evidence and the instruction of the court. Sedg. on Meas. of Dam., 235, 426; *Kniffen vs. McConnell*, 30 N. Y., 285; *King vs. Kersey*, 2 Ind., 402; *Roper vs. Clay*, 18 Mo., 383.

§ 17. **Fraud and Deceit.**—The jury are instructed, that in an action founded in fraud and deceit, if the jury find the defendant guilty, the amount of recovery is not necessarily confined or limited to the actual damages sustained. If the fraud or deceit is shown, by the evidence, to have been deliberate, willful and wanton, the jury are at liberty to give exemplary or punitive damages, in addition to the actual damages sustained. *McAvoy vs. Wright*, 25 Ind., 22.

The jury are instructed, that if they find the defendants, or either of them, guilty, then the measure of the actual damage, if any, sustained by the plaintiff, is the difference between the actual value of the property in question, in the condition it was in when sold, and the value of the same property if it had been as stated and represented by the defendant, at the time of the sale. Sedg. on Meas. of Dam., 338; *Thompson vs. Burgey*, 36 Penn., 403; *Page vs. Parker*, 40 N. H., 47.

§ 18. **Trespass and Trover.**—The court instructs the jury, that where property, taken by a trespasser, has been appropriated to the owner's use by his consent, either expressed or implied, that fact should go in reduction of damages.

And such consent is always implied when the property has been legally seized and held under legal process, either in favor of a stranger or in favor of the trespasser himself. *Bates vs. Courtwright*, 36 Ill., 518.

If, under the evidence and the instruction of the court, the jury find the defendant guilty of the taking and conversion of the property in question, in manner and form as charged in

the declaration, then the measure of the plaintiff's damages is the value of the property at the time of the conversion, as shown by a preponderance of the evidence, with six per cent. interest thereon, from the time of such conversion. Sedg. on Meas. Dam., 547; *Tenney vs. State Bank, etc.*, 20 Wis., 152; *Yates vs. Mullen*, 24 Ind., 277; *Polk vs. Allen*, 19 Mo., 467; *Cutting vs. Fanning*, 2 Ia., 580; *Repley vs. Davis*, 15 Mich., 75.

§ 19. **Work and Labor—Part Performance.**—If the jury, etc., that the plaintiff worked for the defendant, as claimed, and that such work was done under a special contract, as to the price, and that the plaintiff went on and performed, under that contract, a part of the work so contracted for, and that the defendant accepted the work done, and if the jury find, from the evidence, under the instructions of the court, that the plaintiff is entitled to recover, then the contract price must govern the measure of compensation to which the plaintiff will be entitled for the work actually done, whether such price be more or less than the work was actually worth.

§ 20. **Contract to Deliver—Part Performance.**—If the jury, etc., that the plaintiff agreed to furnish defendant a certain (*quantity of stone*), at a given price per (*cord*) and that he furnished a part only of the (*stone*), but not the whole quantity contracted for, and that the defendant accepted and appropriated to his own use the (*stone*) thus furnished, and if the jury find, from the evidence, under the instruction of the court, that the plaintiff is entitled to recover anything, then the jury are instructed, that the contract price must govern as to the price of the (*stone*) actually delivered, whether such price be more or less than they were reasonably worth. *McClelland vs. Snider*, 18 Ill., 58.

§ 21. **Refusal to Deliver Personal Property.**—In this case, if the jury, under the evidence and the instruction of the court, find the issues for the plaintiff, then the measure of damage is the difference between the contract price and the market price, at the place of delivery, at the time of the alleged breach of contract complained of. And in arriving at the amount of dam-

ages, the jury will estimate the quantity of (*hops*) which has not been delivered, and give the difference between the market price and the contract price on so much of the contract as the jury believe, from the evidence, remains to be performed. Sedg. on Meas. Dam., 295; *Carney vs. Newberry*, 24 Ill., 203; *Bush vs. Holmes*, 53 Me., 417; *Cannon vs. Folsom*, 2 Ia., 101; *Crosby vs. Watkins*, 12 Cal., 85; *Zehner vs. Dale*, 25 Ind., 433.

The jury are further instructed, that upon a breach of a contract to deliver articles of personal property, at a particular place, within a certain time, at a certain price, and when the property has been paid for, and subsequently delivered, but not delivered within the specified time, the measure of damages is the difference in the value of the property at such place, at the time of actual delivery, and its market value at the same place at the time fixed in the contract for delivery.

If the jury believe, from the evidence, that a contract was entered into by the defendant, as alleged in plaintiff's declaration, for the sale of (*thirty thousand brick*), at the price of \$— (*per thousand*), to be delivered on demand, and that the plaintiff demanded said brick, as claimed by him, and that he was then ready and willing to pay for the same, and that upon such demand the defendant refused to deliver the brick, then, if you further believe, from the evidence, that the market price of the same kind of brick, at the time and place of such demand, was greater than the contract price, the measure of damages will be the difference between such market price and the price agreed upon. *Sleuter vs. Wallbaum*, 45 Ill., 43.

§ 22. **Property Bought for Re-Sale**—If, under the evidence in the case and the instructions of the court, you find for the plaintiffs, then, upon the question of damages, the court instructs you that if you believe, from the evidence, that at the time of said sale the plaintiffs had a contract for the re-sale of said hams at (*Salt Lake City*), and that they had sold the same as of the quality aforesaid, and that at the time of the sale to the plaintiffs the defendants had knowledge of such contract of re-sale, and knew that the plaintiffs purchased said hams to fill said contract of re-sale, and that the hams were shipped to the purchaser at (*Salt Lake*) before the plaintiffs had notice of

their quality, and that upon their arrival at (*Salt Lake*) the said purchasers refused to receive or pay for the same, for the reason that they were not, at the time of their shipment to him, of the quality he had bargained for, then you will award to the plaintiffs, as damages, such sum of money as you may believe, from the evidence, the plaintiffs had re-sold the said hams for, less such sum as you may believe, from the evidence, said hams were actually worth at the time of their purchase by the plaintiffs; and you will further allow the plaintiffs such sums of money, if any, as you may believe, from the evidence, they were obliged to pay out on account of the transportation of said hams to (*Salt Lake City*). *Thorne vs. McVeagh*, 85 Ill., 81; *Lewis vs. Rountree*, 79 N. C., 122.

§ 23. **Refusal to Accept Personal Property.**—The jury are instructed, that the rule of law is, that when a purchaser of personal property which, by the terms of the purchase, is to be delivered at a specified time and place, and at a stipulated price, refuses to receive and pay for the property, and no part of the purchase price had been paid, and if the price has, in the meantime, declined, then, in an action by the vendor against the vendee for refusing to comply with contract, the proper rule of damages is the difference between the contract price and the current price at the time and place for delivery, as fixed by the contract of sale and purchase. *McNaught vs. Dodson*, 49 Ill., 446.

§ 24. **Slander—Words Actionable, per se.**—If, from the evidence, under the instructions of the court, the jury find the defendant guilty, then the jury are to determine, from all the circumstances of the case, as proved on the trial, what damages ought to be given to the plaintiff, and find their verdict accordingly. 1 Hill. on Torts, 408.

If, from the evidence, under the instruction of the court, you find the defendant guilty, then, in fixing the amount of the plaintiff's damages, you may take into consideration the mental suffering produced by the utterance of the slanderous words, if you believe, from the evidence, that such suffering has been endured by the plaintiff; and the present and probable future injury, if any, to plaintiff's character, which the

uttering of the words was calculated to inflict. *Fry vs. Bennett*, 4 Duer, 247; *True vs. Plumley*, 36 Me., 466; *Swift vs. Dickermann*, 31 Conn., 285; *Hamilton vs. Eno*, 16 Hun, 599; *Bait vs. Budwig*, 28 N. W. Rep., 282.

§ 25. **Damages Presumed, When.**—In an action for slander, the law implies damages from the speaking of actionable words. And also that the defendant intended the injury the slander is calculated to effect. And in this case, if the jury believe, from the evidence, and under the instructions of the court, that the defendant is guilty, as charged in the declaration, then they are to determine, from all the facts and circumstances proved, what damages ought to be given; and the jury are not confined to the mere pecuniary loss or injury sustained. Mental suffering, injury to reputation or character, if proved, are proper elements of damage. *Baker vs. Young*, 44 Ill., 42.

§ 26. **Pecuniary Circumstances of Defendant.**—The jury are instructed, that if they find the defendant guilty, then, in fixing the amount of plaintiff's damages, they may take into consideration, in connection with all the other evidence in the case, the pecuniary circumstances and social standing of the defendant, and the character and standing of the plaintiff, so far as those have been shown by the evidence; and they may also take into consideration the fact, if proved, that the defendant has reiterated the slander on different occasions to different persons. *Harbison vs. Schook*, 41 Ill., 141; *Humphries vs. Parker*, 52 Me., 502; *Lewis vs. Chapman*, 19 Barb., N. Y., 252.

§ 27. **Plaintiff's Bad Reputation may be Shown.**—If the jury believe, from the evidence, that the plaintiff's general reputation for chastity (for honesty), at and before the alleged speaking of the words in question, was bad, then the jury have the right to take this fact into account in assessing the plaintiff's damages, in case you find the defendant guilty. *Duval vs. Davey*, 32 Ohio St., 604; *Maxwell vs. Kenedy*, 50 Wis., 545.

§ 28. **Words Spoken in Heat of Passion.**—If the jury believe,

from the evidence, that any of the slanderous words, charged in the declaration, were spoken by the defendant in the heat of passion, in a quarrel or altercation provoked by the plaintiff, then the jury have a right to take this fact into consideration in fixing the amount of damages.

If the jury believe, from the evidence, that the slanderous words were spoken in the heat of passion, provoked by plaintiff, and were spoken in the presence of persons well acquainted with the plaintiff, and were not circulated by defendant afterwards; and further, that the plaintiff has not, in fact, been injured by the speaking of the words, then the facts may be taken into account by the jury in fixing the amount of plaintiff's damages.

§ 29. **Drunkenness in Mitigation.**—The court instructs the jury, that if you find, from the evidence, that the defendant is guilty of speaking the slanderous words, as charged in the declaration; that the defendant was, at the time, intoxicated with spirituous liquors to such an extent as to deprive him of the rational exercise of his mental faculties, this fact will be proper to be considered by the jury in determining whether the defendant was prompted in speaking the words by malice, in fact, and whether he ought to be charged with exemplary or punitive damages. *Howell vs. Howell*, 10 Ired. (N. C.), 84; *Gates vs. Meredith*, 7 Ind., 440.

§ 30. **Plea must be Filed in Good Faith.**—If the jury believe, from the evidence, and from the facts and circumstances proved on the trial, that when the defendant filed his plea of justification, he had no reasonable hope or expectation of proving the truth of it, then, if the jury believe, from the evidence, that the defendant is guilty of the slander charged in the declaration, they may, in fixing the amount of the plaintiff's damages, regard the filing of the plea as an aggravation of the original slander. *Harbison vs. Schook*, 41 Ill., 141; *Swails vs. Butcher*, 2 Ind., 84.

Although you should find, from the evidence, that the defendant has not sustained his plea of justification, still the fact that he has filed such plea should not of itself be regarded by the jury as an aggravation of the original offense, if they be-

lieve, from the evidence, that it was filed in good faith, and with an honest belief, on the part of the defendant, that he would be able to sustain the plea by evidence.

§ 31. **Exemplary Damages may be Given in Slander, When.**—If the jury, under the evidence and the instructions of the court, find the defendant guilty in this case, in assessing the plaintiff's damages, they are not confined to such damages as will simply compensate the plaintiff for such injuries as the evidence shows she has received, by reason of the speaking and publishing of the defamatory words charged in the declaration, but they may, in addition thereto, assess against the defendant, by way of punishment to him and as an example to others, such damages as the jury, in their sound judgment, under all the evidence in the case, believe the defendant ought to pay, not exceeding, in any event, the amount of damages claimed by the plaintiff in the declaration; provided the jury believe, from the evidence, that the defamatory words were spoken maliciously or wantonly by the defendant. *Templeton vs. Graves*, 59 Wis., 95.

If the jury find the defendant guilty, they should then determine, from all the facts and circumstances proved, what damages ought to be given to the plaintiff; and the jury are not confined to the mere pecuniary loss or injury, but they may give damages as a punishment to the defendant, as well as to compensate the plaintiff for the stain inflicted upon her character; provided the jury believe, from the evidence, that the defendant, in speaking the defamatory words, was actuated by malice in fact.

If the jury believe, from the evidence, that the defendant is guilty of uttering the slanderous words charged in the declaration, then they may take into consideration the pecuniary circumstances of the defendant, and his position and influence in society, so far as those matters have been shown, by the evidence, in estimating the amount of damages which the plaintiff ought to recover. *Hosley vs. Brooks*, 20 Ill., 115.

Though the jury may believe, from the evidence, that the defendant was guilty of speaking the slanderous words charged in the declaration, still, if the jury find, from the evidence, that the words were spoken without actual malice on the part

of the defendant, though under circumstances showing a want of caution and a proper respect for the rights of the plaintiff, and that the plaintiff has suffered no special damage from the speaking of the words, then the jury should only give compensatory damages, and in such case compensatory damages are such as will pay the plaintiff for his expenses and trouble in carrying on the suit, and disproving the slanderous words. *Armstrong vs. Pierson*, 8 Clarke (Ia.), 29.

§ 32. **Common Carriers—Loss of Baggage.**—The court instructs the jury, that if they find for the plaintiff in this case, in assessing his damages, they may include the value of all such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey in question, and which are shown, by the evidence, to have been lost by the defendant, if any such loss has been shown.

§ 33. **Goods Lost.**—The jury are instructed, that the measure of damages, in case of a failure of a common carrier to deliver goods according to contract, and which are lost, is their market or actual value at the time when, and the place where, they should have been delivered; and such value is purely a question of fact to be fixed by the jury, from the evidence in the case. *C. & N. W. Ry. Co. vs. Dickinson*, 74 Ill., 249.

§ 34. **Damages, How Determined.**—The jury are instructed, that a party suing for an injury received can only recover such damages as naturally flow from, and are the immediate result of, the act complained of. The jury should be governed solely by the evidence introduced before them, and they have no right to indulge in conjectures and speculations not supported by the evidence. *Indianapolis B. & W. Rd. Co. vs. Birney*, 71 Ill., 391.

If, from the evidence in the case, and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage,

but the jury may, themselves, make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation and experience in the business affairs of life. *Ottawa Gas L. Co. vs. Graham*, 28 Ill., 73.

§ 35. **Exemplary Damages—In Trespass.**—If the jury believe, from the evidence, that a trespass was committed, as charged in the declaration, by the defendant, or his servants, by his direction, in a wanton, willful and insulting manner, and that the plaintiff has suffered any actual damage therefrom, then the jury are authorized to find exemplary damages; that is, such damages as will compensate the plaintiff for the wrong done to him, and to punish the defendant, and to furnish an example to deter others from the like practices. Sedg. on Meas. Dam., 35; *Cutler vs. Smith*, 57 Ill., 252.

In action of trespass to persons or property, when the evidence shows the trespass to have been malicious and willful, oppressive, or wantonly reckless, the jury may give what are known as punitive or exemplary damages. *Ill. & St. L. Rd. Co. vs. Cobb*, 68 Ill., 53.

To justify the recovery of exemplary damages for a trespass to property, it must be shown, by the evidence, that the defendant was actuated by malice or a reckless disregard of the plaintiff's rights, and when two are sued, and one of them is not chargeable with malice or recklessness, exemplary damages cannot be recovered against both. *Becker vs. Dupree*, 75 Ill., 167.

§ 36. **Exemplary Damages Defined.**—Exemplary damages mean damages given by way of punishment for the commission of a wrong willfully or wantonly, or with some element of aggravation. They are not the measure of the price of the property, or actual damage sustained, but they are given as smart money in the way of pecuniary punishment, to make an example for the public good, and to teach other persons not to offend in like manner. *Bates vs. Davis*, 76 Ill., 222.

NOTE.—This increase of damages dependent upon the conduct of the defendant, is considered in some states as actual damage given for the injury to the *feelings* of the complaining party, such as shame, mental anxiety, or insulted honor, as in the next four instructions.

§ 37. **Malicious Prosecution.**—The jury are instructed, that if, from the evidence and instruction of the court you find the defendant guilty, then in assessing the amount of the plaintiff's damages you have a right to take into account the peril to which defendant was subjected of losing his liberty, and also the injury to his reputation and feelings, if you find from the evidence that he was injured in his reputation and feelings by the charge made against him. *Lavender vs. Hudgens*, 32 Ark., 763.

The jury are instructed, that in actions of this kind, if the jury find the defendant guilty under the evidence and instructions of the court, and that the plaintiff has sustained any injury or damage by reason of the charge brought against him, then, in assessing the plaintiff's damages, the jury are not limited to mere compensation for the actual damage sustained by him; they may give him such a further sum by way of exemplary or vindictive damages as the jury may think right in view of all the circumstances proved on the trial, as a protection to the plaintiff and as a salutary example to others to deter them from offending in like manner. And in determining the amount of exemplary damages which would be proper to give, the jury may take into consideration the pecuniary circumstances of the defendant so far as they have been proved. *Winn vs. Peckham*, 42 Wis. 493.

§ 38. **Trespass or False Imprisonment.**—If, under the evidence and instructions of the court you find the defendant guilty, and if you believe from the evidence that the defendant was guilty of willful, gross and wanton oppression of the plaintiff, then, in assessing the plaintiff's damages, you are not limited to the amount of his actual pecuniary loss, but you may also take into consideration his physical pain or bodily suffering if any is shown, also his mental suffering, such as anguish of mind, sense of shame, humiliation, or loss of honor, reputation or loss of social position, if you find that these things have resulted from the acts complained of, and allow the plaintiff such compensation therefor as you think will make good the injury sustained. *Stewart et al. vs. Maddox*, 63 Ind., 52; *Scripps vs. Riley*, 38 Mich. 10; *Fenelon vs. Butts*, 53 Wis., 344.

In an action for false imprisonment the jury should only allow what are known as compensatory damages—that is, such an amount as will make good to the plaintiff the damages actually sustained by him, provided the jury find the defendant guilty—and in this case, if the jury find from the evidence under the instructions of the court that the defendant is guilty, then, in fixing the plaintiff's damages you may include the delay in his business, if proved, also any bodily pain or mental anguish, if you believe, from the evidence, that such pain and mental anguish were suffered by the plaintiff in consequence of the acts complained of, and also any injury to the plaintiff's business, profession, reputation or social position, if you believe, from the evidence, that he has sustained such injury by reason of the wrongful acts complained of, and give the plaintiff such an amount as damages as you believe, from the evidence, will compensate him for the damages thus received.

CHAPTER XXXII.

NEGLIGENCE GENERALLY.

- SEC. 1. Burden of proof.
2. Ordinary and reasonable care required of defendant.
3. Plaintiff must exercise reasonable care and prudence.
4. Master liable for negligence of servant.
5. Servant must be acting within the scope of his employment.
6. Wrongful act of servant.
7. The negligence charged must be the proximate cause.
8. Contractor's negligence.
9. Contributory and gross negligence.
10. Comparative negligence.
11. Equal negligence.
12. Injury the result of negligence and accident.
13. Wrongful and voluntary exposure.
14. Ordinary care defined.
15. Gross negligence defined.
16. Collision on highway.
17. Danger from fire.
18. Negligence of counties and towns.
19. Intoxication as contributory negligence.

§ 1. **Burden of Proof.**—The burden of proving negligence rests on the party alleging it; and where a person charges negligence on the part of another as a cause of action, he must prove the negligence, by a preponderance of evidence. And in this case, if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant. *Cooley on Torts*, 673; *McQuilken vs. Cent., etc., Co.*, 50 Cal., 7; *Q. A. & St. L. R. R. Co. vs. Wellhoener*, 72 Ill., 60; *Hoyt vs. Hudson*, 27 Wis., 656; *St. Paul vs. Kuby*, 8 Minn., 154; *Jeffersonville, etc., vs. Lyon*, 55 Ind., 477; *Murphy vs. Chicago, etc., Rd. Co.*, 45 Ia., 661; *Strand vs. C. & W. M. Ry. Co.*, 34 N. W. Rep., 715.

The court instructs you, that if you believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff was injured thereby,

then, as regards the defendant's liability, it makes no difference whether such negligence appears or is proved by the testimony on the part of the plaintiff, or by the defendant's own witnesses. *Keokuk, etc., Co. vs. True*, 88 Ill., 608.

You are instructed, that in determining the question of negligence in this case, you should take into consideration the situation and conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if you believe, from the evidence, that the injury complained of was caused by the negligence of the defendant's servants, as charged in the declaration, and without any greater want of care and skill on the part of plaintiff than was reasonably to be expected from a person of ordinary care, prudence and skill in the situation in which he found himself placed, then the plaintiff is entitled to recover. Wharton on Neg., § 304.

§ 2. **Ordinary and Reasonable Care Required of Defendant.**—The jury are instructed, that it is the duty of a street railroad company to exercise all reasonable care and prudence to carry their passengers with safety; and if an injury to a passenger results from the carelessness of its servants in the management of its cars, from a defective track or from an overloaded car, or from all combined, the company will be liable; provided, the passenger's own negligence does not contribute to the injury. *Chicago, etc., Ry. Co. vs. Young*, 62 Ill., 233.

§ 3. **Plaintiff Must Exercise Reasonable Care and Prudence.**—The jury are instructed, that the plaintiff was bound to exercise ordinary care and prudence in attempting to cross the street, and though the jury may believe, from the evidence, that the crossing in question was dangerous, still, if they further believe, from the evidence, that the accident in question is attributable to the want of ordinary care on the part of the plaintiff, then she cannot recover in this suit, unless the jury further believe, from the evidence, that the defendant was guilty of such gross negligence as implies willful or wanton injury. Cooley on Torts, 674; *Indianapolis, etc., R. R. Co. vs. McClure*, 26 Ind., 370; *Litchfield, etc., Co. vs. Taylor*, 81 Ill., 590; *Brown vs. Hannibal, etc., Rd. Co.*, 50 Mo., 461; *Cooper vs. Cent. R. R. Co.*, 44 Ia., 134.

The court instructs you, that while a person walking on a public highway is bound to use all reasonable care and caution to avoid injury, yet, he is not held to the highest possible degree of precaution and prudence; and to authorize a recovery for injuries negligently inflicted, it is only necessary that it appear, from the evidence, that he was using reasonable care and caution.

The court instructs you, that when a person is injured by the negligence of another, he must, after the injury is received, act as an ordinarily reasonable and prudent man would under the circumstances, and use reasonable diligence to know whether medical aid is required, and to use all reasonable efforts to have himself cured; and if he does not do so, he cannot recover of the defendant for any suffering, injury or damage which results from his failure to exercise such care and diligence. *Toledo, W. & W. R.R. Co. vs. Eldy*, 72 Ill., 138.

§ 4. **Master Liable for Negligence of Servant.**—The master is civilly liable for the tortious acts of his servants, whether of omission or commission, or whether negligent, fraudulent or deceitful, if done in the course of his employment, even though the master did not authorize or know of such acts, or may have forbidden them. But the act must be done, not only while the servant is engaged in the service he is employed to render, but it must pertain to the particular duties of that employment. *Snyder vs. Hannibal R.R. Co.*, 60 Mo., 413; *Robinson vs. Webb*, 11 Bush (Ky.), 464; *Eckert vs. St. Louis, etc.*, 2 Mo. App., 36.

The court instructs you, that where a tort or wrong is committed by an agent or employe, in the course of his employment, and while pursuing the business of his employer, the employer will be liable for the damages resulting from the wrongful act, although it is done without the employer's knowledge or consent, unless the wrongful act is a willful departure from such employment or business. 1 Add. on Torts, 31; Cooley on Torts, 533; *Goddard vs. Grand Trunk R. R. Co.*, 57 Me., 202; *Phila., etc., R. R. Co. vs. Derby*, 14 How., U. S., 468; *Bryant vs. Rich*, 106 Mass., 180; *Ind. R. R. Co. vs. Anthony*, 43 Ind., 183.

The court instructs you, that when the employer gives his

servant general directions as to the business which is entrusted to him to perform, then the employer is held to have confided in the discretion of his servant, and is answerable for all the acts of the servant in the performance of the duty required.

If you believe, from the evidence, that before and at the time of the injury complained of, the said S. W. was in the employ of the defendants, and that in the course of such employment and while pursuing the business of his employers, and while the plaintiff was walking in one of the public streets in the city of C., the said S. W., carelessly and negligently permitted a horse that he was riding to run against the plaintiff, and thereby injure the plaintiff, as charged in the declaration, then you should find the issues for the plaintiff; provided, you further find, that the plaintiff was, at the time, exercising all reasonable care and caution to avoid such injury.

§ 5. **Servant Must be Acting Within Scope of Employment.**—Although the jury may believe, from the evidence, that, at the time in question, the said A. B. was in the general employment of the defendant as, etc., and that he committed the wrongful act complained of in the declaration, still, if the jury further believe, from the evidence, that when the said A. B. (*ran over the plaintiff*) he was not acting within the scope his employment, or in furtherance of the defendant's business, but was carrying into effect some purpose of his own not connected with his employment, then the defendant would not be liable for such act.

If you believe, from the evidence, that the injuries complained of were caused by the negligence or carelessness of the servants of the defendant, in the course of their employment as such servants, as charged in the declaration, and without any fault on the part of the plaintiff, which contributed to the injury complained of, then the defendant is liable in this action.

If you believe, from the evidence, that the injuries complained of were caused by the want of reasonable care and watchfulness of the servants of the defendant, in the course of their employment as such servants, as charged in the declaration, and that the plaintiff made use of all the care, exertion and skill to avoid the injury, which could reasonably be ex

pected from a man of ordinary prudence, energy and skill, under the circumstances shown by the evidence, then the defendant is liable in this action.

The rule of law is, that a master is responsible for the wrongful act of his servant, even if it be willful, reckless or malicious; provided, the act is done by the servant within the scope of his employment, and in furtherance of his master's business, or for the master's benefit. 1 Add. on Torts, 31.

§ 6. **Wrongful Act of Servant.**—If the jury believe, from the evidence, that defendant's engineer, with intent to frighten plaintiff's horses, unnecessarily and wantonly let off steam or blew a whistle, and thereby frightened plaintiff's horses, so that they ran off and injured him while he was in the exercise of all reasonable care and prudence in that behalf, then the defendant is guilty, and the jury should find for the plaintiff. *Toledo, etc., Rd. Co. vs. Harmon*, 47 Ill., 298.

§ 7. **The Negligence Charged Must be the Proximate Cause.**—The court instructs the jury, that the rule of law is, that every person must be held liable for all of those consequences which flow naturally and directly from this act, or which might have been foreseen and reasonably expected as the result of his conduct, but not for those consequences which do not flow naturally and directly from his acts, or which he could not have foreseen or reasonably have anticipated as the result of his conduct. *Cooley on Torts*, 68; *Wharton on Neg.*, § 74-78; 2 *Parsons on Cont.*, 456; *Rigby vs. Hewitt*, 5 Exch., 240; 1 Add. on Torts, 6; *Fent vs. T. P. & W. Rd. Co.*, 59 Ill., 349; *Brashberg vs. Milwaukee, etc., Rd. Co.*, 50 Wis., 231.

If you believe, from the evidence, that the defendant was guilty of the negligence or carelessness charged in the declaration, and that the injury complained of was the natural consequence of such negligence or carelessness, and such as might have been foreseen and reasonably anticipated as the result of such negligence or carelessness, then such carelessness or negligence should be regarded as the approximate cause of the injury.

You are instructed, that although you may believe, from the evidence, that the injury complained of was occasioned by

the acts of the defepdant, still, if you further believe, from the evidence, that such injury was not the natural result of the acts of the defendant, and could not have been foreseen or reasonably expected to result from the conduct of the defendant, then the defendant would not be liable.

You are instructed, that an act is not to be deemed the proximate cause of an injury, unless the injury was such a consequence of the act as, under the surrounding circumstances of the case, might and ought to have been foreseen or anticipated by an ordinarily reasonable and prudent man, as reasonably likely to flow from the act. *Hoag vs. Lake Shore, etc., Rd. Co.*, 85 Penn. St., 293.

§ 8. **Contractor's Negligence.**—The court instructs the jury, as a matter of law, that when work is contracted to be done by a contractor, the owner retaining or exercising no control over the manner of doing the work, and the work is not of itself dangerous, but only becomes so by the negligence of the contractor, then the employer is not liable for injuries resulting from the negligence of the contractor. *Myer vs. Hobbs*, 57 Ala., 175; *Pierrepoint vs. Loveless*, 72 N. Y., 211.

Although the jury may believe, from the evidence, that the defendant was the owner of the premises adjoining the sidewalk in question, and that the work on the building and walk was being done for hire, and that a dangerous and unsafe opening had been left in the walk by reason whereof the plaintiff was injured, as alleged, while exercising reasonable care himself, still, if you further believe, from the evidence, that before the time of the alleged injury, the defendant had entered into a written contract with A. & B. for an erection of a building on said premises, and that the said A. & B. were then reputed to be skillful, reliable and competent builders, and that, at the time of the injury, said contractors were in the exclusive possession of said premises and sidewalk, pursuant to the terms of said contract, for the purpose of erecting said building and doing said work, and were not subject to the control or direction of the defendant as to the manner of doing the work, and that the acts charged as the cause of the injury were the acts of the said contractors or their employes, and not of the defendant nor of his servants or agents, then the de-

fendant would not be liable for such injury. *Ryan et al. vs. Curran et al.*, 64 Ind., 345.

That when work is contracted to be done which is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and makes no reasonable effort to guard it himself, then he is negligent, and, if injury results therefrom, he cannot escape liability, on the ground that the work was done by a contractor. *Wood vs. Ind. S. D.*, 44 Ia., 27; *Hale vs. Johnson*, 80 Ill., 185.

The court instructs the jury, that it is a rule of law, that when certain work, and the manner of doing it, are assented to by the employer, and damage to a third party must necessarily or naturally result from the work and the manner of doing it, then the employer will be liable. And in this case, if the jury believe, from the evidence, that the defendant employed the said A. B. to blast the rocks in question, for the purpose of getting out the stone from the quarry, and that the said A. B., in pursuance of such contract, did blast out the stone in question, and that plaintiff's property was damaged in consequence of such blasting, then the defendant would be liable for such damage, provided you further believe, from the evidence, that the said A. B. was not guilty of any special negligence or want of ordinary care in doing said work, which resulted in or contributed to such injury. *Tiffin vs. McCormack*, 34 Ohio St., 638.

§ 9. **Contributory and Gross Negligence.**—Although the jury may believe, from the evidence, that the defendant's servants were guilty of negligence, which contributed to the injury (or death) in question, still, if the jury further find, from the evidence, that the plaintiff (or deceased) was also guilty of negligence, which directly contributed to the injury, then the plaintiff cannot recover in this suit, unless the jury further find, from the evidence, that the negligence of the defendant's servants was malicious and willful or wantonly reckless, showing an utter disregard for the rights and property of the plaintiff (or the life of the deceased), and that the negligence of the plaintiff was but slight, as explained in these instructions. Cooley on Torts, 674; *Lafayette, etc., Rd. Co. vs. Adams*, 26 Ind., 76; *Mulherrin vs. Delaware, etc., Rd. Co.*,

81 Penn. St., 366; *Chicago, etc., Rd. Co. vs. Donahue*, 75 Ill., 106; *Brown vs. Hannibal, etc., Rd. Co.*, 50 Mo., 461; *Cooper vs. Cent. Rd. Co.*, 44 Ia., 134; *Burham vs. St. Louis, etc., Rd. Co.*, 56 Mo., 338; *Hutchins vs. Priestly E. W., etc., Co.*, 28 N. W. Rep., 85; *Winchester vs. Case*, 5 Ill. App., 486.

Although the jury may believe, from the evidence, that the defendant was guilty of negligence upon the occasion in question, which contributed directly to the injury complained of, yet, if they further believe, from the evidence, that the plaintiff was also guilty of negligence which contributed directly to the injury, then the plaintiff cannot recover in this suit, unless the jury further find, from the evidence, that the conduct of the defendant's servants was malicious and willful or wantonly reckless.

The court instructs you, that if you believe, from the evidence, that the (*deceased*) might, in the exercise of ordinary care and caution, have seen the danger and avoided it, and that his omission to do so directly contributed to the injury, then he was guilty of such negligence as will prevent a recovery in this suit, unless you further find, from the evidence, that the injury was caused by the willful, intentional or wantonly reckless acts of the defendant or its servants.

If you believe, from the evidence, that the defendant, or its servants, were guilty of negligence, as explained in these instructions, upon the occasion referred to, and that the plaintiff was injured thereby, as stated in the declaration, and that he has sustained damage by reason thereof; and also that the plaintiff was himself guilty of slight negligence, which contributed to the injury, and without which the accident would not have happened, still the defendant would be liable in this case; provided, you further believe, from the evidence, that the servants of the defendant saw the danger, to which the plaintiff was exposed, in time to have averted it, and by the exercise of ordinary care and prudence could have prevented the injury. Wharton on Neg., § 301; Cooley on Torts, 675; *Harlan vs. St. Louis, etc., Rd. Co.*, 65 Mo., 22.

NOTE.—In Illinois, Georgia and Tennessee, a party guilty of contributory negligence, may recover for injuries sustained through the negligence of another; provided, the negligence of the other party is gross and the contributory negligence is slight, when compared with each other. The instructions in this section are drawn with reference to this view of the law.

§ 10. Comparative Negligence—Contributory Negligence Slight.—The court instructs the jury, that while a person is bound to use reasonable care to avoid injury, yet he is not held to the highest degree of care and prudence, of which the human mind is capable; and to authorize a recovery for an injury, he need not be wholly free from negligence; provided, his negligence is but slight, and the other party be guilty of gross negligence, in comparison therewith, as defined in these instructions. *Galena & C. U. R. R. Co. vs. Jacobs*, 20 Ill., 478; *C., B. & Q. R. R. Co. vs. Hazzard*, 26 Ill., 373; *C., B. & Q. R. R. Co. vs. Dewey, Admr.*, 26 Ill., 255; *Ill. C. R. R. Co. vs. Simmons*, 38 Ill., 242; *C. & A. R. R. Co. vs. Gretzner*, 46 Ill., 76; *C. & N. W. R. R. Co. vs. Sweeny*, 52 Ill., 325; *C., B. & Q. R. R. Co. vs. Damerell*, 81 Ill., 450; *C., B. & Q. R. R. Co. vs. Lee*, 68 Ill., 580; *C., B. & Q. R. R. Co. vs. Johnson, Admr.*, 103 Ill., 512; *Chicago vs. Stearns*, 105 Ill., 554; *W., St. L. & P. Ry. Co. vs. Wallace*, 110 Ill., 114; 3 Am. and Eng. Ency., 367.

And in this case, although the jury may believe, from the evidence, that the plaintiff was guilty of slight negligence, yet if the jury further believe, from the evidence, he was exercising ordinary care, and that the plaintiff's negligence was but slight, and that the defendant's servants were guilty of gross negligence in comparison with the negligence of the plaintiff as explained in these instructions, and that the injuries complained of were caused by the negligence of the defendant's servants, then the plaintiff is entitled to recover.

The court further instructs the jury, that if they believe, from the evidence, that the plaintiff was exercising ordinary care and prudence at the time in question and was guilty of only slight negligence, which contributed to the injury, and that the defendant (*servants of the defendant*) was wanting in the care and prudence which a very careless man would ordinarily exercise under the same circumstances, then the defendant was guilty of gross negligence; and if the jury further believe, from the evidence, that such gross negligence was the cause of the injury in question, as charged in the declaration, and that the negligence of the plaintiff was but slight when compared with the negligence of the defendant, then they should find the issues for the plaintiff. *Lycoming Ins. Co. vs. Barringer*, 73 Ill., 230.

The court instructs the jury, that while a person, walking on a public highway, is bound to use all reasonable care and caution to avoid injury, yet he is not held to the highest possible degree of precaution and prudence; and to authorize a recovery for injuries negligently inflicted, the plaintiff need not be wholly free from negligence; provided, his negligence is slight in itself, and the negligence of the other party is gross in comparison with each other.

And in this case, though the jury may believe, from the evidence, that the plaintiff was guilty of slight negligence, yet, if the jury further believe, from the evidence, that the defendant was guilty of gross negligence, and that the injury complained of was caused thereby, and that the negligence of the plaintiff was but slight when compared with the negligence of the defendant, then the plaintiff is entitled to recover.

The court instructs the jury, that the question of the liability of the defendant does not depend wholly upon the absence of all negligence upon the part of the plaintiff (*or deceased*), but it depends upon the relative degree of care, or want of care, manifested by both parties, as shown by the evidence. And in this case, although the jury may believe, from the evidence, that the plaintiff (*or deceased*) was not wholly without fault, yet, if they further believe, from the evidence, that he was exercising ordinary care and prudence, and that the defendant was guilty of gross negligence, upon the occasion referred to, and that the injury complained of was occasioned by such gross negligence, and if you further believe, from the evidence that the negligence of the plaintiff was but slight in comparison to the negligence of the defendant, then the jury may find the defendant guilty.

The jury are instructed, that if they believe, from the evidence, that upon the occasion referred to by the witness, a bell was not rung nor a whistle sounded, at a distance of (80 rods) from the crossing, and kept ringing or whistling until the crossing was reached, and that the plaintiff was lulled into security by reason of such neglect on the part of the defendant, and in attempting to cross the railroad track, was struck and injured, as charged in the declaration, then the plaintiff will be entitled to recover, in this suit, if he was exercising such care at the time as a reasonably prudent man will adopt

for the security of his person or property under similar circumstances, even though he was guilty of slight negligence; if the jury believe, from the evidence, that his negligence was but slight, and the negligence of the defendant was gross in comparison therewith. *Chi. & A. Rd. Co. vs. Elmore*, 67 Ill., 176.

It was the duty of the defendant to use reasonable diligence to keep the sidewalk in question in a reasonably safe condition, and if the jury believe, from the evidence, that the defendant failed to perform such duty, and that by reason of its negligence in that regard the said sidewalk was permitted to remain out of repair and in a dangerous condition, by reason whereof the plaintiff, while exercising reasonable care on her part, received the injury complained of, then the defendant is liable. And the court further instructs the jury, that if they find, from the evidence, that the plaintiff was herself guilty of some negligence, but that the defendant was guilty of gross negligence contributing to such injury, and that the plaintiff's negligence was slight as compared with the negligence of the defendant, still she may be entitled to recover. *City of Chicago vs. Stearns*, 105 Ill., 554.

That in an action against a railroad company, to recover for injuries occasioned by the alleged negligence of the company in running its train, although the servants of the company may have been guilty of negligence, contributing to the injury complained of, still, if the plaintiff could, by the exercise of ordinary care and prudence, have avoided the injury, he cannot recover. *Chicago & A. Rd. Co. vs. Jacobs*, 63 Ill., 178.

The court instructs the jury, that to entitle the plaintiff to recover, the jury must believe, from the evidence, that the injury complained of was occasioned by the carelessness or negligence of the defendant, or its servants, in the manner charged in the declaration. And if the jury believe, from the evidence, that the plaintiff was guilty of negligence, contributing to the injury, then to entitle plaintiff to recover, the jury must further believe, from the evidence, that the negligence of the defendant was gross, and that of the plaintiff was but slight, in comparison with each other; and if the jury believe, from the evidence, that the negligent conduct of the plaintiff contributed as much, or nearly as much, to produce

the injury as that of the defendant, or that he was not, at the time, exercising ordinary care, then the plaintiff cannot recover, and the jury should find for the defendant.

The court instructs the jury, that even if they should believe, from the evidence, that the deceased was guilty of slight negligence, upon the occasion referred to, still, if they further believe, from the evidence, that he was in the exercise of ordinary care and prudence, and that the servants and agents of the company were guilty of gross negligence, and that the negligence of the deceased was but slight, in comparison with the negligence of the servants and agents of the company, and, further, that the persons for whose use this suit is brought have sustained damage in the death of the deceased, as charged in the declaration, then the jury should find the issues for the plaintiff.

The jury are instructed, that the law is, that if a railroad company is guilty of gross negligence, resulting in the death of a person, and such person while in the exercise of ordinary care and prudence is guilty of only slight negligence in comparison to the negligence of the railroad company, contributing to the injury, such contributory negligence will not of itself prevent a recovery against the company. *P., P & J. Rd. Co. vs. Champ*, 75 Ill., 577.

The court instructs the jury, that even though they may believe, from the evidence, that the deceased was guilty of slight negligence, yet, if they further find, from the evidence, that the negligence of the deceased was but slight, and that the negligence of the defendant was gross in comparison to each other; and they further find, from the evidence, that the death of the deceased was caused by such gross negligence on the part of the defendant, then the negligence of the deceased, if he was in the exercise of ordinary care at the time, will not prevent a recovery in this case, if the jury find, from the evidence, that all the other material averments in the declaration are proved. *Ill. Cent. Rd. Co. vs. Goddard*, 72 Ill., 567; 3 Am. & Eng. Ency., 367.

§ 11. **Equal Negligence.**—The court instructs the jury, that though they may believe, from the evidence, that the defendant was guilty of negligence, upon the occasion in question,

and that such negligence contributed to the injury complained of, yet, if the jury further believe, from the evidence, that the plaintiff was also guilty of an equal, or nearly equal, degree of negligence, directly contributing to the injury, and without which it could not have occurred, then the jury should find the defendant not guilty.

In this case, if you believe, from the evidence, that both the deceased and the agents and servants of the railroad company were guilty of gross negligence, contributing to the injury of which the deceased died, then you should find your verdict for the defendant.

§ 12. **Injury the Result of Negligence and Accident.**—The court instructs the jury, as a matter of law, that if a person receives an injury as the combined result of an accident and of negligence on the part of another, and the accident would not have occurred but for such negligence, and the danger could not have been foreseen or avoided by the exercise of reasonable care and prudence, on the part of the person injured, then the person guilty of the negligence will be liable for the injury received. *City of Aurora vs. Pulfer*, 66 Ill., 270.

The court instructs you, that to entitle the plaintiff to recover in this suit, it must appear, from the evidence, that the injury complained of was occasioned by the want of attention, carelessness or negligence on the part of the defendant or its servants, as charged in the declaration, and was not simply the result of an accident; and if you believe, from the evidence, that the injury resulted from an accident which could not have been foreseen or guarded against, by the exercise of ordinary and reasonable care and prudence, on the part of the defendant, then the plaintiff cannot recover, and you should find for the defendant.

§ 13. **Wrongful and Voluntary Exposure.**—The jury are instructed, that if a man wrongfully gets upon a freight car and voluntarily puts himself in a dangerous place on a car, while in motion, he does so at his own risk; and if the persons in charge of the car see him and do not notify him that he is in danger, this is not such negligence as will render the company liable—the persons in charge of the car are under no legal obligation to notify him that such place is a dangerous one.

§ 14. **Ordinary Care Defined.**—The court instructs the jury, that ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances. *Norfolk, etc., Rd. Co. vs. Ormsby*, 27 Gratt., *Cronin vs. The Village, etc.*, 50 Wis., 375.

Slight Negligence Defined.—That slight negligence means the absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use under similar circumstances. *Hammond vs. Town of, etc.*, 40 Wis., 35.

§ 15. **Gross Negligence Defined.**—By the term gross negligence, as used in these instructions, is meant a wrongful act or omission, willfully and maliciously done or omitted, or wantonly reckless conduct, showing an utter disregard of the rights of others.

The term gross negligence, as used in this class of cases, means the want of that degree of prudence and care which even extremely careless and imprudent men are accustomed to exercise, under the same or similar circumstances.

Gross negligence is defined to be the want of slight care, or an utter disregard of consequences in the performance of a given act. *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill., 523.

§ 16. **Collision on the Highway.**—The jury are instructed as a matter of law, that the rights of footmen and horsemen, on a public highway, are equal, and the law requires both parties to use all reasonably prudent precautions to avoid accident and damage to themselves or others.

If the jury believe, from the evidence, that at the time of the alleged injury the plaintiff was walking along one of the public streets of the city of C., with his back towards the said S. W. and at the same time the said S. W. was riding a horse on the same street, in the direction of the plaintiff, and that the said S. W. saw, or by the exercise of reasonable care and caution could have seen, the plaintiff in season to have stopped his horse, altered its course, or in some way avoided the accident; and if the jury further believe, from the evidence, that the said

S. W. did not do so, but carelessly and negligently permitted the horse which he was riding to run against the plaintiff and knock him down, and thereby injured him, as charged in the declaration, this would be negligence on the part of S. W.; and if the jury further believe, from the evidence, that the said S. W. was, at the time, in the employ of the said defendants, and pursuing their business, then the defendants are liable for such negligence; provided, the jury further believe, from the evidence, that the plaintiff was himself without fault or negligence which contributed to the injury. And was at the time exercising ordinary care to avoid personal injury.

Even though the jury should believe, from the evidence, that the plaintiff was at first guilty of some degree of negligence, still, if the jury further believe from the evidence that the driver of the wagon actually saw the plaintiff and had a full view of the situation before the accident and by the exercise of reasonable and ordinary care could have avoided or prevented the injury, and he then failed to exercise such care and, in consequence of the want of such reasonable and ordinary care on his part, the plaintiff received the injury complained of, then the defendant is guilty.

A person about to cross a street in a city, in which there is an ordinance against fast driving, has a right to presume, if he has no knowledge or notice to the contrary, that others will observe and conform to the ordinance in driving on said street, and it would not be negligence on his part in such a case to act on the presumption that, in attempting to cross, he will be exposed to a danger which could only arise through a disregard of the ordinance by others. *Baker vs. Pendergast*, 32 Ohio St., 494.

If a person about to cross a street knows, or by the exercise of reasonable care and caution could, that others are driving along the street at the place of crossing at a rate of speed forbidden by the ordinance, or if he has the full means of knowing the rate at which they are driving, then the existence of such an ordinance would not authorize a presumption which was known to be otherwise, or which, by the exercise of ordinary care and prudence, he might have known to be otherwise.

In the use of a public highway a person has a right to

expect from others using the same highway ordinary prudence and care to avoid accidents, and to rely upon that presumption in determining his own manner of using the road.

Although the jury may believe, from the evidence, that the injury complained of resulted from the negligence of the defendant, still this will not entitle the plaintiff to recover, if the jury believe, from the evidence, that, by using reasonable and ordinary care and judgment, the driver of plaintiff's team might have avoided the injury.

In deciding whether the plaintiff's daughter was guilty of negligence upon the occasion in question, or was exercising ordinary care in driving the team as she did, the jury should consider her age and the fact that she was a woman, and she would not be guilty of negligence if she used that degree of care and judgment that a person of her age and sex would ordinarily use.

If the jury believe, from the evidence, that defendant's teamster in charge of his horses and wagon, was a person of ordinary and reasonable skill in the business in which he was engaged, and that he exercised the ordinary judgment and skill of a prudent and competent teamster in driving defendant's team, at the time of the alleged injury, but that by an error of judgment, he contributed to the injury of plaintiff's horse, without any want of ordinary care, skill or caution on his part, then the verdict must be for the defendant.

§ 17. **Danger from Fire.**—The jury are instructed, that the question of negligence or diligence depends upon and partakes of the surrounding circumstances peculiar to each case, and in this case, if the jury believe, from the evidence, that defendant's mill, as it was accustomed to be used, endangered the buildings of the plaintiff by reason of throwing out fire and sparks from the chimney, then it became the duty of the defendant to avail himself of some such well known apparatus, or other means, to prevent the escape of sparks and fire from the chimney as experience had shown to be reasonably adequate for that purpose; whether such apparatus or means was generally used on such chimneys or not, provided the jury believe, from the evidence, that apparatus had been discovered and was generally known to persons engaged in the

same or similar business which would have lessened the danger, and were in their nature and operation reasonably susceptible of being applied to chimneys of the kind used by the defendant. *Hoyt vs. Jeffers*, 30 Mich., 181.

If the jury believe, from the evidence, that the erection and operation of defendant's mill endangered the plaintiff's property by fire, then it was the duty of the defendant in the erection and operation of said mill to use such precautions, and to take such measures to lessen the danger and prevent the injury as an ordinarily prudent and careful man conversant with the business and the danger and all the surroundings affecting the risks would ordinarily have used to protect his own property from danger. And if the jury believe, from the evidence, that the defendant fell short of this degree of precaution, and operated his mill with less care and caution than an ordinarily prudent and careful man would have used under the same circumstances, and that a loss thereby accrued to the plaintiff, then the defendant is liable, provided the jury believe, from the evidence, that the plaintiff's own negligence did not in any manner contribute directly to the injury.

If the jury believe, from the evidence, that the operation of defendant's mill endangered the plaintiff's property by the escape of sparks from the chimney, then, in adopting means to check the flow of sparks, the defendant was bound not only to adopt measures calculated to arrest the danger, if such means were generally known and used, but he was bound to use the means which, in the progress of science and improvement, have been shown by experience to be the best for that purpose, if the evidence shows that there are any such—unless it be some recent invention not generally known or unreasonably expensive. Whether the defendant's mill did endanger plaintiff's property and whether the defendant had adopted such means as experience had shown were best calculated to lessen the danger, etc., etc., are questions of fact to be determined by the jury from the evidence in the case.

§ 18. *Negligence of County and Towns (By Statute).*—By the statutes of this state, it is made the imperative duty of the board of county commissioners, to keep or to cause all the bridges in the county to be kept in good and safe repair—and if the

board of county commissioners negligently suffer a bridge in their county to remain out of repair after notice, etc., and a person in the ordinary use of the bridge is thereby injured in person or property, without any fault on his part, he will have an action for damages against the county. *House vs. County Coms.*, 60 Ind., 580.

§ 19. **Intoxication as Contributory Negligence.**—The court instructs the jury, as a matter of law, that a man cannot voluntarily place himself in a condition, whereby he loses such control of his brain or muscles as a man of ordinary prudence and caution in the full possession of his faculties would exercise, and by such loss of control contribute to an injury to himself, and then hold one ignorant of his condition liable in damages. And if you believe, from the evidence, that at the time of the alleged injury, the plaintiff was so intoxicated, that he had lost such control of his brain or muscles as an ordinarily prudent and cautious man in the full possession of his faculties would exercise under similar circumstances, and that the defendants were ignorant of such condition, and if you further find, from the evidence, that such intoxication contributed to the alleged injury, then the plaintiff cannot recover. *Strand vs. C. & W. M. Ry. Co.*, 34 N. W. Rep., 715.

CHAPTER XXXIII.

NEGLIGENCE—MUNICIPAL CORPORATIONS.

- SEC. 1. Liable for unsafe condition of streets, when.
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§ 1. **Liable for Unsafe Condition of Streets, When.**—The court instructs the jury, that the defendant corporation is bound by law to use all reasonable care, caution and supervision to keep its streets, sidewalks and bridges in a safe condition for travel, in the ordinary modes of traveling, by night as well as by day, and if it fails to do so, it is liable for injuries sustained, in consequence of such failure; provided, the party injured is himself exercising reasonable care and caution; and the fact that the plaintiff may, in some way, have contributed to the injury sustained by him, will not prevent his recovery if, by ordinary care, he could not have avoided the consequences to himself or the defendant's negligence. Cooley on Torts, 625; *Mayor*,

etc., vs. *Dodd*, 58 Ga., 238; *Centerville vs. Woods*, 57 Ind., 192; *Rowell vs. Williams*, 29 Ia., 210; *St. Paul vs. Kuby*, 8 Minn., 154.

If you believe, from the evidence, that the corporate authorities of the city of S. did not exercise all reasonable care and supervision over that portion of the sidewalk where the injury in question is alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe; and if you further believe, from the evidence, that the plaintiff, in attempting to walk along that portion of the sidewalk, by reason of such defect was injured, and has sustained damage thereby, as charged in the declaration, and that he was at the time exercising reasonable care and caution to avoid such injury, then the defendant is liable, and you should find for the plaintiff.

§ 2. **Law Imposes the Duty to Keep Streets in Reasonably Safe Condition.**—The law is, that where the city charter gives the city authorities power to provide for keeping the streets in repair, and to prohibit obstructions therein, then it is the duty of the city authorities to keep the streets and sidewalks in a safe condition for travel, so far as this can be done in the exercise of reasonable care and prudence in that respect. *Cooley on Torts*, 625; *The People vs. The Mayor, etc.*, 63 Ill., 207; *Prideaux vs. Mineral Point*, 43 Wis., 513; *Mayor, etc., vs. Cooley*, 55 Ga., 17.

The jury are instructed, as a matter of law, that any person traveling upon a sidewalk of a city, which is in constant use by the public, has a right, when using the same with due diligence and care, to presume, and to act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes, obstructions or other defects. *Indianapolis vs. Gaston*, 58 Ind., 224.

If the jury believe, from the evidence, that the plaintiff, while passing along one of the sidewalks in said city, was injured, as alleged in his declaration, and that the injury would not have happened to him if the said sidewalk had been in a reasonably good repair and safe condition, then the defendant is liable for such injury; provided, the jury believe, from the evidence, that the plaintiff was exercising reasonable care and

- caution to avoid injury while passing over said walk; and that said city did not use reasonable care to keep said sidewalk in safe condition.

§ 3. **Duty to Provide Guards and Notice.**—The court instructs the jury, that while a city has the right to construct sewers, or other improvements in its streets, yet, when it causes such work to be done, it is bound to take notice of the character of the work and the condition in which the streets are left, whether safe or dangerous.

If, in making improvements, it becomes necessary to leave dangerous holes or openings in the street, or to leave piles of dirt, or other obstructions, in the street, in such a way as to render it dangerous for wagons or carriages to pass, then it is the duty of the city to put up guards or notices of some kind, to warn travelers of the dangerous condition of the street; and if they do not do so, and persons are thereby injured, while in the exercise of reasonable care and prudence themselves, the city will be liable for the injuries thus sustained.

The court instructs the jury, that all incorporated towns, villages and cities, whether incorporated by special charter or under general laws, have the power, and it is their duty, to keep in repair the roads and bridges within their corporate limits, and if injury results to any individual by reason of a neglect of such duty, while he himself is exercising reasonable care and prudence to avoid such injury, the corporation will be liable in damages. *The President, etc., vs. Meredith*, 54 Ill., 84.

§ 4. **Street Includes Sidewalks.**—The jury are instructed, that the streets of a city extend to and include that portion thereof occupied and used for sidewalks. In the grant by the legislature of control over the streets of the city, to the city authorities, control over the sidewalks passes to them as a part of the street, and this imposes upon the city authorities the duty of keeping the sidewalks in repair, as a part of the street. *City of B. vs. Bay*, 42 Ill., 503.

§ 5. **Accident and Negligence.**—The court instructs the jury, that if they believe, from the evidence, that the plaintiff was

injured and sustained damage, as charged in the declaration, and that such injury was the combined result of an accident, and of a defect in the walk, and that the damage would not have been sustained but for the defect, although the primary cause of the injury was a pure accident, still, if the jury further believe, from the evidence, that the plaintiff was guilty of no fault or negligence, and the accident one which common and ordinary prudence and sagacity, on the part of the plaintiff, could not have foreseen and provided against, then the city is liable; provided, the jury believe, from the evidence, that the city authorities were guilty of negligence in not remedying such defect. *Wilson vs. Atlanta*, 60 Ga., 473.

§ 6. **Reasonable Care and Caution, What.**—The jury are further instructed, that reasonable care and caution required of the plaintiff, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an ordinarily prudent person, under the circumstances surrounding the plaintiff at the time of the alleged injury.

§ 7. **Care Must be Proportionate to the Known Danger.**—If the jury believe, from the evidence, that the place where the accident in question occurred, was necessarily more dangerous than the ordinary streets and sidewalks, and that, by the exercise of ordinary care and prudence, this condition of things could have been known to the plaintiff, or was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit.

Although the jury may believe, from the evidence, that the city authorities had negligently suffered snow and ice to accumulate on the walk in question, until it was in a dangerous condition for walking, still, if you further believe, from the evidence, that this condition of the walk was known to the plaintiff before he attempted to walk over it, and that he might easily have avoided passing over such dangerous place, then he was not using that reasonable care and prudence to avoid injury which the law requires and he cannot recover in this case. *Schaeffer vs. Sandusky*, 33 Ohio St., 246.

The jury are instructed that a person has no right to knowingly expose himself to danger, and then recover damages he might have avoided by the use of reasonable precaution; and if the jury believe, from the evidence, that the plaintiff, before and at the time of the alleged injury, knew of the defect in the sidewalk, and in going to his house on the night of the alleged injury could have taken another and safe route, of equal, or nearly equal, distance, then the jury have a right to consider his failure to take such other route, if such there was, into consideration in determining whether the plaintiff was, at the time of the injury, exercising due care and caution for his own safety. *Town of Elkhart vs. Ritter*, 66 Ind., 136.

§ 8. **No Liability without Negligence.**—That municipal corporations, such as the defendant, are only liable for such defects in their sidewalks as are in themselves dangerous or such that a person exercising reasonable care and caution cannot avoid danger in passing over it, if the jury believe, from the evidence, that the defect in the sidewalk in question was not in itself dangerous to the safety of a person passing over it with reasonable care and caution, and that the alleged injury was the result either of a mere accident without negligence on the part of defendant, or that it resulted from a want of reasonable care and caution on the part of the plaintiff, then the jury should find the defendant not guilty.

The jury are instructed that, in this case, there can be no liability on the part of the defendant, unless there was neglect of duty in respect to the repair of the sidewalk on the part of the officers of the city; and there can be no such neglect of duty, unless the jury find from the evidence that the officers of the city knew of the defect in the sidewalk complained of, or with reasonable diligence could have known of it, long enough before the accident occurred, to have had it repaired. *Sheil et al. vs. The City of Appleton*, 49 Wis., 125.

It was the duty of the defendant city to keep and maintain its streets and sidewalks in good order and repair, for the use and convenience of the traveling public walking and passing thereon, so far as this could be done by the exercise of all reasonable care and oversight on the part of its officers. And if the jury believe, from the evidence, that the sidewalk at the

time and place in question was out of repair and in a dangerous condition and that the city authorities knew of the defect, or by the exercise of reasonable care might have known of it in time to have remedied the defect before the accident in question, and did not do so, then the city is liable in this suit, provided the jury further believe, from the evidence, that the plaintiff was injured and suffered damage by reason of the defective walk, as charged in the declaration, and that he was himself in the exercise of ordinary care to avoid the injury.

§ 9. **Slight Negligence will not Defeat Recovery.**—That a traveler on a public street is held to the exercise of only ordinary care. Slight negligence, which is a want of extraordinary care, will not defeat a recovery for an injury, received in consequence of a defect in the street; provided, the evidence shows that the city authorities were guilty of negligence, in permitting the defect to exist in the street, and that the traveler was injured thereby, and was using ordinary care to avoid the injury. *Guffin vs. The Town of Willow*, 43 Wis., 509.

§ 10. **Streets and Walks to be Kept Reasonably Safe.**—The court instructs the jury, as a matter of law, that a city is not required to have its sidewalks so constructed (*or kept in such condition*) as to secure immunity in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution.

And in this case, if the jury believe, from the evidence, that the sidewalk was so constructed as to be sufficiently level and smooth for ordinary travel, and so built that it would not, by reason of any peculiarities of its construction, cause snow or ice to accumulate thereon, and that the accident was attributable solely to the slippery condition of the sidewalk, occasioned by a recent fall of snow, and that the sole cause of the accident was the temporary slipperiness of that part of the sidewalk caused by the recent fall of snow thereon, such a condition of the sidewalk would not be a defect for which the city would be liable. *City of Chicago vs. McGiven*, 78 Ill., 347.

§ 11. **Negligence of Driver.**—The law is, that the driver of a private conveyance is the agent or servant of the person riding in such conveyance, provided such driver is employed by him or subject to his control, and if such person, while riding along a public highway or street, is injured, in consequence of obstruction or defects negligently permitted to remain in the street or highway, and the driver is guilty of a want of ordinary care and caution, and his negligence materially contributes to such injury, then the person injured cannot recover, as against the city, for the injury thus received. *Prideaux vs. Mineral Point*, 43 Wis., 513; Red. Car., § 364; *Lockhart vs. Lichtenthaler*, 46 Penn. St., 151.

§ 12. **Not Obligated to Open Streets.**—The court instructs the jury, that cities are under no legal obligation to open up streets for the use of the public. The legal obligation of a city to repair streets, sidewalks and bridges within its corporate limits, only relates to such as are opened or constructed under its authority, or those which its officers have assumed control over. *Craig vs. Sedalia*, 63 Mo., 417; Shear. & Red. on Neg., § 127; *Wilson vs. The Mayor, etc.*, 1 Denio, 595; *Joliet vs. Verley*, 35 Ill., 58.

There is no legal obligation resting upon a city to build sidewalks, construct gutters or pave streets, but when the city does make these improvements for the benefit of the public, it then becomes its duty to use all reasonable care and exertions to keep them in repair. *City of Alton vs. Hope*, 68 Ill., 167.

§ 13. **Degree of Care Required.**—The jury are instructed, that the defendant is not bound to any greater degree of care and diligence than is sufficient to keep its streets and sidewalks in a reasonably safe condition, and if any accident occurs when they are in such reasonably safe condition, the defendant is not liable for such accident.

§ 14. **Do not Insure Safety.**—The jury are instructed, that a municipal corporation is not liable for every accident that may occur from defects in its sidewalks or streets. Its officers are not required to do everything that human energy

and ingenuity can possibly do to prevent the happening of accidents or injury to the citizen. If they have exercised a reasonable care in that regard, they have discharged their duty to the public. *City of Centralia vs. Krouse*, 64 Ill., 19.

The city is not an insurer or a warrantor of the condition of her streets and sidewalks; nor is every defect therein actionable, though it may cause the injury sued for. It is sufficient to relieve the city from liability in this case if you find from the evidence that the street (or walk) was in a reasonably safe condition for travel at the time the accident is alleged to have occurred.

If you believe, from the evidence, that at the place where the plaintiff met with the injury complained of, the street (or sidewalk) was at the time in a reasonably safe condition, your verdict should be for the defendant. *City of Ind. vs. Gaston*, 28 Ind., 224.

§ 15. **Liable for Negligence of Others, When.**—Although the jury may believe, from the evidence, that the sidewalk in question was constructed by a private person, and not under the direction or supervision of the city, still this would not exempt the city from liability from defects in the walk; provided, the jury believe, from the evidence, that the walk was so constructed as to be dangerous for ordinary travel, and that this defect was known to the officers of the city, or that by the exercise of ordinary care they might have known of such defect in time to have remedied it before the accident. *Barnes vs. The Town of Newton*, 46 Ia., 567; *Cooley on Torts*, 626; *Wendell vs. Troy*, 39 Barb., 329; *Shear. & Red. on Neg.*, § 147; *Centerville vs. Woods*, 57 Ind., 192; *Phelps vs. Mankato*, 23 Minn., 276.

It is the duty of the city to use all reasonable care and vigilance in the selection of agents, servants and contractors, in making improvements, and to retain control and superintendence over them in the performance of their duties, and to enforce such measures of care and vigilance as will guard the public against exposure to injury, so far as this can reasonably be done.

The court instructs the jury, as a matter of law, that where work is done upon the streets of a city, there is a reasonable pre-

sumption that it is done by the proper authorities of the city, and in a suit to recover damages for an injury occasioned by the negligent manner of doing such work, it is not necessary, in the first instance, to prove that it was done by persons employed by the city, as this will be presumed, unless the contrary appears from the evidence.

And, in this case, if the jury believe, from the evidence, that the injury complained of was caused by a dangerous (*pile of dirt or opening*), left in the street in question by persons employed by the city, to place a sewer or water pipe in such street, then the jury are instructed, that it is not necessary for the plaintiff, in order to recover in this suit, to prove that the city authorities had actual notice that such * * * was left in said street; provided, the jury further believe, from the evidence, that such work was done under the supervision of the (*street commissioner, etc.*). *City of Chicago vs. Brophy*, 79 Ill., 277.

If the jury believe, from the evidence, that the defendant let out the job of filling up and grading (*Main street*) to other persons, at so much per yard, the grading to be done under the supervision of defendant's engineer, and that such engineer went upon the ground with such other persons, and pointed out to them where to take the soil from and where to put it, and such other persons did the work as directed by the engineer, then the law is, that the relation of master and servant existed between the city, the engineer and such other persons doing the work, and the city is liable in all respects, the same as if it had done the work by men employed by it in any other way. *Nevins vs. City of Peoria*, 41 Ill., 502.

The jury are instructed, that if the 'city authorities knowingly permit a person to occupy or obstruct a street, it is the duty of such authorities to use all reasonable care and precautions to see that the person so permitted properly guards and protects such obstructions, and if the city authorities negligently fail to perform such duty, the city will be liable to one who is injured by such obstructions, if he is himself, at the time, using reasonable care to avoid the injury. Whether, in this case, the city authorities did know, etc., etc., are questions of fact for the jury, to be determined by the evidence. *City of Ind. vs. Doherty*, 71 Ind., 5.

The defendant had a right to construct water works for municipal purposes, and for the use of the inhabitants of the city, and for that purpose to lay pipes in the street, and to permit others to do so, and the city is liable for any damage sustained by a person while traveling in the street, by reason of such work being done, unless the city authorities, or the persons doing the work, were guilty of negligence which occasioned the injury, and while the party injured was himself using reasonable care and caution to avoid the injury. *City of Logansport vs. Dicks*, 70 Ind., 65.

Although the jury may believe, from the evidence, that the city officers had contracted with, etc., for the laying of the water pipes in the street, still the city, notwithstanding such contract, was charged with the duty of taking all reasonable precaution to keep the street in a safe condition, for use in the usual manner, so far as this could reasonably be done, while the work was progressing, and if you believe, from the evidence, that the city officers did not do this but were guilty of negligence in permitting a dangerous, etc., and that the plaintiff was thereby injured, as alleged in his complaint, then the city is liable for such injury, provided the jury believe, from the evidence, that the plaintiff was himself, etc. *City of Logansport vs. Dicks*, 70 Ind., 65; *Butler vs. Bangor*, 67 Me., 385.

§ 16. Not Liable for the Negligence of Others, When.—The jury are instructed, that when a party, without the consent of the authorities of an incorporated town, digs or leaves open a dangerous hole or pit in the street, and a person is thereby injured, the town will not be liable for such injury, unless the authorities have actual notice of the nuisance, or it has remained a sufficient time, so that in the exercise of ordinary care and diligence they ought to have had notice of the dangerous condition of the street. *Fahey vs. The President, etc.*, 62 Ill., 28.

The jury are instructed, that when the duty is imposed by law upon a city corporation to keep its streets in safe condition, for use by the public, the duty cannot be shifted off upon a person employed by the city to perform it; and if an injury results from the negligence of such person in the performance

of such duty, the corporation will be liable for the damage. *The City of Springfield vs. Le Claire*, 49 Ill., 476.

The jury are, instructed, that when a dangerous place is made in the street by the unlawful act of third parties, unknown or without the knowledge or consent of the city authorities, the city cannot be deemed negligent until knowledge or notice of such defect is brought home to the officers of the city, unless the dangerous place has existed for such a length of time before the injury, that the city authorities, in the exercise of reasonable care and diligence, might, and ought to have known of its existence.

The court instructs the jury, that when an act is done which is unlawful in itself, such as placing an obstruction in a public street, which detracts from the safety of travelers, the author will be held liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury. *Weick vs. Lander*, 75 Ill., 93.

§ 17. **Must Have Notice, Actual or Instructive.**—If the jury believe, from the evidence, that the sidewalk in which the defect is alleged to have been, and where the plaintiff is alleged to have been injured, was properly and safely constructed and laid down, and that prior, and up to, or about the time of the injury, it appeared to be in a proper and safe condition, then, if there be no evidence that the defendant had actual knowledge of such defect, or that the defect existed for such length of time before the injury, that the defendant, if exercising proper care and diligence, would have known of it, the jury should find the defendant not guilty. *Schweickhardt vs. St. Louis*, 2 Mo. App., 571; *Hutchins vs. Littleton*, 124 Mass., 289; *Chicago vs. Stearns*, 105 Ill., 554; *Hearn vs. Chicago*, 20 Ill. App., 249.

Notwithstanding the jury may believe, from the evidence, that the sidewalk, at the time of the alleged injury, was defective, yet this alone would not be sufficient evidence of negligence on the part of the defendant. In order to charge the defendant with negligence, it must appear, from the evidence, not only that the sidewalk was defective at the time of the alleged injury, but it must further appear that such defect was actually known to the city through some of its officers, agents or servants, or that the defect had existed for such a length of

time prior to the alleged injury, that the city, if exercising ordinary diligence, would or should have known of the defect. *The City of Chicago vs. McCarthy*, 75 Ill., 602; *Bartlett vs. Kittery*, 68 Me., 358.

A city is bound only to the exercise of reasonable prudence and diligence in the construction of its sidewalks, and is not required to foresee and provide against every possible danger or accident that may occur.

It is only required to keep its streets and sidewalks in a reasonably safe condition, and it is not an insurer against accidents. *City of Chicago vs. Bixby*, 84 Ill., 82.

§ 18. Defective Sidewalk—Notice Presumed, When.—The court instructs the jury, that when the sidewalk of a city is out of repair, and remains so for such a length of time that the public authorities of the city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the walk will not be necessary to hold the city liable for injury sustained by a person, in consequence of the dangerous condition of the street, if he is himself using reasonable care to avoid such injury. *Shear. & Red. Neg.*, § 148; *Mayor vs. Sheffield*, 4 Wall., 189; *City of Springfield vs. Doyle*, 76 Ill., 202; *Schweickhardt vs. St. Louis*, 2 Mo. App., 571; *Hume vs. N. Y.*, 74 N. Y., 264; *Albrittton vs. Huntsville*, 60 Ala., 486; *Chicago vs. Dale*, 115 Ill., 386.

The jury are instructed, that the defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair, to render them reasonably safe, for all persons passing on or over the same; and if the jury believe, from the evidence, that the defendant failed to use all reasonable care and precaution to keep its sidewalk in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby, without negligence or want of care on plaintiff's part, then he is entitled to recover in this suit. *Chicago vs. Dale*, 115 Ill., 386; *Dillon on Municipal Corporations*, § 996 *et seq.*

§ 19. Injury to Adjoining Property—Changing Grade.—The

jury are instructed, that a municipal corporation, while acting within the scope of its authority, in making excavations in a street, for the purpose of opening it or improving it, if using reasonable care and skill in performing the work, is not liable to a lot owner for an injury resulting therefrom to his lot or the buildings thereon. *Shear. & Red. on Neg.*, § 129; *City of Quincy vs. Jones*, 76 Ill., 231; *Pontiac vs. Carter*, 32 Mich., 164; *Wegmann vs. Jefferson*, 61 Mo., 55.

The jury are instructed, that while the corporate authorities of cities are vested with power to grade their streets, yet the mode in which the power is to be exercised, in reference to the rights of others in the enjoyment of their property, is limited in the same way and to the same extent as the power of a private person in the use of his property, and if the authorities of a city in altering or changing the grade of the streets, do not do the work in good faith and with reasonable care and skill, to avoid damaging the adjoining property owners, the city will be liable to such owners for all damage directly resulting therefrom. 2 *Dil. on Corp.*, § 783; *Callender vs. Marsh*, 1 Pick., 418; *Radcliff's Executors vs. Mayor, etc.*, 4 Comst., 195; *Delphi vs. Evans*, 36 Ind., 90; *Reading vs. Keppleman*, 61 Penn. St., 233; *Hendershott vs. Ottumwa*, 46 Ia., 658; *Mayor, etc., vs. Hill*, 58 Ga., 595; *City of B. vs. Brokaw*, 77 Ill., 195; *Shear. & Redf. Neg.*, § 144.

§ 20. **Liable for Want of Reasonable Care Only.**—The jury are instructed, that a city has full control over the grades of its streets, and may lower or elevate them at will, and the owner of lots adjacent to the street cannot call it to account for error in judgment, in fixing the grade, nor recover damages for inconvenience or expense incurred in adjusting their premises to the grade of the street, provided, the city authorities exercise reasonable care and skill in the performance of this work.

That the authorities of a city have a right to alter the grades of the streets at their discretion, and if this is done with reasonable care and skill, no liability arises from their acts. Neither courts nor juries can inquire whether the grade adopted is the best one or not, and, in this case, the only question for the jury is whether, in doing the work in question,

the city officers acted in good faith, and with reasonable care and skill, to avoid damage to the plaintiff's property. *Lee vs. The City of Minn.*, 22 Minn., 13; *Detroit vs. Beckman*, 34 Mich., 125; *Cheever vs. Ladd*, 13 Blatchf., 258; *Tate vs. Mo., etc., Rd. Co.*, 64 Mo., 149.

Contra: The jury are instructed, that the owner of a lot abutting on an unimproved street, or where no grade has been established by the city authorities, erecting a building thereon, assumes the risk of all damage which may result from the city subsequently establishing a grade, and improving the street to conform to such grade. The liability of the city for injuries to a building abutting on a street by the grading of the street, only exists when the building was erected.

If the jury believe, from the evidence, that the city, in improving (*Main street*) in said city, fixed the grade and caused to be constructed sewers and drains in said street, to carry off the surplus water which necessarily, in case of rains, would run down said street, by reason of said grading, and that, on or about, etc., there came a rain, and said sewers or drains were stopped up, or were otherwise defective, so that they would not carry off the surplus water, and thereby the water from said rain was forced into the basement of the plaintiff's building, and the plaintiff thereby damaged, then the jury should find for the plaintiff to the amount which the proof shows such damage to be.

The jury are instructed, that the city of —— has control of all streets and sidewalks in said city; and if the jury believe, from the evidence, that the sidewalk or street, in front of plaintiff's premises, pitched toward his lot, and was permitted so to be constructed by said city, or was permitted by said city so to remain after being so built by others, after a reasonable time in which to have changed it, then the city cannot shield itself from liability for flooding plaintiff's premises, if the evidence shows they were so flooded, on account of the pitch of said street or sidewalk. *City of Aurora vs. Gillet*, 56 Ill., 132.

§ 21. **Defective Plan of Public Improvement.**—The jury are instructed, that a city cannot be made liable for injuries to persons or property which arise from a defective plan of a

public improvement, although the city may be liable for want of reasonable care or skill in the execution of the work itself; and although the jury may believe, from the evidence, that the plan adopted by the city for draining the streets, was defective and unskillful, and likely to result in injury to, etc., still the city would not be liable for any injuries resulting from such defect or want of skill in the plan adopted, provided the city was not guilty of negligence or want of reasonable care and skill in doing the work necessary to carry out the plan. *Lansing vs. Toolan*, 37 Mich., 152; *Detroit vs. Beckman*, 34 Mich., 125; *Darling vs. Bangor*, 68 Me., 108; *Dever vs. Capelli*, 4 Col., 25.

If the jury believe, from the evidence, that the city authorities before the erection of the building in question, had so improved and appropriated the street to public use as to fairly and reasonably indicate to the public that the grade of the street had been permanently fixed and that no change therein would be made, and that the plaintiff or his grantor, relying on such corporate acts as a final decision as to the wants of the public regarding the grade of such streets, erected the building in conformity to such grade, then, if the jury further believe, from the evidence, that by the recent improvement and change of grade of said street the plaintiff's building and other improvements connected therewith have been injured and the plaintiff thereby damaged, then the defendant is liable therefor. *Cincinnati vs. Penny*, 21 Ohio St., 499; *Mayer, etc., vs. Nichol*, 59 Tenn., 338; *Elgin vs. Eaton*, 83 Ill., 535; *French vs. Milwaukee*, 49 Wis., 584; *Dore vs. Milwaukee*, 42 Wis., 108.

§ 22. **Changing Watercourses.**—The court instructs the jury, that if a city, in exercising its power of changing the grade of its streets, fails to exercise reasonable prudence and skill, it will be liable for all damages that result from such failure.

And if a city, in fixing the grade of a street, or in afterwards changing it, flows water upon a lot that it did not naturally carry off, the city will be liable for damages, if any are caused thereby. *Ashley vs. Fort Huron*, 35 Mich., 236; *City of B. vs. Brokaw*, 77 Ill., 194; *Kobs vs. Minnea*, 22 Minn., 159.

The court further instructs the jury, that a city has no more power over its streets than a private person has over his own land. A city has no right to turn surface water onto private property, and if a city, in fixing the grade of a street, turns a stream of water and mud onto the ground or into the cellar of a citizen, or creates in his neighborhood a stagnant pool, likely to generate disease, the city will be liable in damages, the same as an individual would for doing the same thing. *City of Aurora vs. Reed*, 57 Ill., 29.

§ 23. **Sewer out of Repair.**—The jury are instructed, as a matter of law, that the city is under no legal obligation to construct drains or sewers in any particular portion of the city, but, if it does build drains or sewers for corporate purposes, it is bound to exercise reasonable care and oversight over them to keep them unobstructed and in repair, so that adjoining property owners shall not be unnecessarily injured thereby. And in this case, if the jury believe, from the evidence, that the city either built the sewer in question or has adopted and controlled it as a part of the general sewerage of the city, then the city was bound to use all reasonable and ordinary care and supervision over it to keep it in such a state of repair as that it should do no unnecessary injury to plaintiff's property; and if you further believe, from the evidence, that the city authorities did not exercise reasonable and ordinary care and supervision over the said drain or sewer to keep it in repair, but carelessly and negligently permitted it to become choked up and out of repair, and that plaintiff's property has been damaged thereby, as charged in his complaint, then the city is liable for such damages, and the jury should find for the plaintiff, provided you further find, from the evidence, that he was guilty of no fault or negligence which contributed to such injury. *City of South Bend vs. Paxon*, 67 Ind., 228.

§ 24. **Measure of Damages.**—If the jury believe, from the evidence, that the plaintiff was injured by reason of the defendant negligently failing to keep its sidewalk in reasonably good repair, or negligently allowing the same to remain in an unsafe condition, as explained in these instructions, and without fault on his part, and that he has sustained damage, then

the jury have a right to find for him such an amount of damages as the jury believe, from the evidence, will compensate him for the personal injury so received, and for his loss of time in endeavoring to be cured, and his expenses, necessarily incurred in respect thereto, if any such loss or expenses have been proved; and also for the pain and suffering undergone by him, and any permanent injury, if any such has been proved.

CHAPTER XXXIV.

NEGLIGENCE—RAILROADS.

- SEC. 1. Duty to furnish safe machinery, etc.
2. Liable for the acts of their servants, when.
3. Negligence *per se*.
4. Plaintiff must exercise ordinary care.
5. Right to prescribe rules.
6. Expelling a person from the cars.
7. Passengers can only be put off at a station.
8. Injuries to persons.

FENCING THE TRACK.

9. Failure to comply with the law, negligence *per se*.
10. Fencing the track—Statutory provisions.
11. Company must exercise reasonable care.
12. Company held only for reasonable care—Casual breach in fence.
13. Stock unlawfully running at large.
14. Obligation to fence not limited to adjoining owner.
15. Cattle guards.
16. Plaintiff's contributory negligence.
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18. What plaintiff must prove to recover.

INJURIES BY FIRE.

19. *Prima facie* negligence.
20. Reasonable care required to prevent the spread of fire.
21. Must provide the most approved apparatus to prevent the spread of fire.
22. Dry weeds and grass, accumulating along right of way.
23. Degree of care required of land owner.
24. Reasonable care and diligence only required of the company.

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25. Crossings must be put in safe condition.
26. Reasonable care required at crossings.
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28. Signals to be given at crossings.
29. Rights and liabilities of companies and travelers, equal and mutual.
30. Company not to suffer tall weeds or brush to obstruct the view.

31. Care required of travelers.
32. Care to be proportioned to known danger.
33. Contributory negligence—Gross negligence.
34. Negligence *per se*, in traveler.
35. Conduct in presence of sudden danger.
36. Danger must be the result of the negligence charged.
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38. Neglect to ring the bell.
39. Burden of proof as to ringing the bell.
40. Must exercise reasonable care and watchfulness to avoid injuring stock.
41. Speed through cities and villages.
42. Speed not limited by ordinance.

CHILDREN.

43. Rules as to children—Contributory negligence.
44. Negligence as regards children.

SERVANTS.

45. Master and servant—Master liable to servant, when.
46. Duty towards employes.
47. Servant does not take the risk of dangers not incident to the business.
48. Servant not bound to inquire whether the road is safely constructed, etc.
49. Negligence of the company in employing servant.
50. Reasonable care only required for the safety of employes.
51. Employe assumes all ordinary risks.
52. Servant having knowledge of defects.
53. Servant must use reasonable care and caution.
54. Negligence of fellow servant.
55. Fellow servants defined.
56. Duty to make rules for the safety of servants.

§ 1. **Duty to Furnish Safe Machinery.**—The court instructs the jury, that it is the duty of railroad companies to use all reasonable means and efforts to furnish good and well constructed machinery, adapted to the purposes of its use, of good material, and of the kind that is found to be safest when applied to use; and while they are not required to seek and apply every new invention, they must adopt such as are found, by experience, to combine the greatest safety with practical use. *St. Louis, etc., Rd. Co. vs. Valirius*, 56 Ind., 511; *Wedgewood vs. Chicago, etc., Rd. Co.*, 41 Wis., 478; *Pittsburgh R. R. Co. vs. Nelson*, 51 Ind., 150; *Porter vs. Hannibal, etc., Rd. Co.*, 60 Mo., 160; *T., W. & W. Ry. vs. Fredericks*, 71 Ill., 294.

§ 2. **Liable for the Torts of their Servants, When.**—Railroad companies are responsible to passengers for the unlawful acts of their servants and agents employed in running their trains, when such wrongful acts are committed in connection with the business intrusted to them, and spring from, or grow immediately out of, such business. *Gasway vs. Atlanta, etc., Rd. Co.*, 58 Ga., 216; *Bass vs. Chicago, etc., Rd. Co.*, 42 Wis., 654; *Brown vs. Hannibal, etc., Rd. Co.*, 66 Mo., 588.

You are instructed, that if the servants of a railroad company, while in the discharge of their duties, pervert the appliances of the company to wanton or malicious purposes, to the injury of others, the company is liable for such injuries. *C. B. & Q. Rd. Co. vs. Dickson*, 63 Ill., 151.

§ 3. **Negligence, per se.**—The court instructs the jury, that it is negligent for persons engaged in using cars on a railroad track to put a car in motion where it may do injury to others, without making any provision for stopping it, or examining to see whether any person is on or about other cars on the same track, with which the one put in motion may collide; and if injury results therefrom to one who is guilty of no negligence himself, he will be entitled to recover for such injury. *Noble vs. Cunningham*, 74 Ill., 51; *Quackenbush vs. Chi. & N. W. R. R. Co.*, 35 N. W. Rep., 523.

§ 4. **Plaintiff Must Exercise Ordinary Care.**—The court instructs the jury, that in an action against a railroad company to recover for injuries occasioned by the alleged negligence of the company, in running its train, although the servants of the company may have been guilty of negligence, contributing to the injury complained of, still, if the plaintiff could, by the exercise of ordinary care and prudence, have avoided the injury, he cannot recover. *Chi. & Alton Rd. Co. vs. Jacobs*, 63 Ill., 178.

The court further instructs you, that to authorize a recovery for injuries done by a railroad company, it is not enough to show the company guilty of negligence, but it must appear, from the evidence, that the injured party employed all reasonable means to foresee and prevent the injury, or else it must appear, from the evidence, that the injury was

caused by the willful or wantonly reckless acts of the servants of the company. Wharton on Neg., § 300.

If you believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff was injured thereby, and that the plaintiff was himself guilty of some slight degree of negligence, this would not alone prevent a recovery, provided the jury further believe, from the evidence, that the act of defendant which caused the injury was done by the defendant after discovering the plaintiff's negligence and that the defendant could have avoided the injury by the exercise of reasonable care. *Morris vs. The Chicago, etc.*, 45 Ia., 29; 27 Conn., 393; 50 Mo., 464; 18 Ga., 699.

§ 5. **Right to Prescribe Rules.**—The jury are instructed, that a railroad company has a right to require of its passengers the observance of all reasonable rules, calculated to insure the comfort, convenience, good order and behavior of all persons on the train, and to secure the proper conduct of its business; and if a passenger wantonly disregards any such reasonable rule, the obligation to carry him farther ceases, and the company may expel him from the train at any regular station, using no more force than may be necessary for that purpose. *Sandford vs. Eighth Ave., etc., Rd. Co.*, 23 N. Y., 343; *I. C. Rd. Co. vs. Whitmore*, 43 Ill., 420; *Crawford vs. Cincinnati, etc., Rd. Co.*, 26 Ohio St., 580; *State vs. Chovin*, 7 Ia., 204; *Shelton vs. Lake Shore, etc., Rd. Co.*, 29 Ohio St., 214.

The court further instructs you, that whatever rules tend to the comfort, order and safety of the passengers on a railroad, the companies are authorized to make and enforce; but such rules must be reasonable and uniform. A rule setting apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable rule, and it may be enforced. *C. & N. W. Rd. Co. vs. Williams*, 55 Ill., 185; *Bass vs. Chi. & N. W. Rd. Co.*, 36 Wis., 450; *Com. vs. Power*, 7 Met., 596.

A railroad company has the lawful right to make all reasonably necessary rules for the conduct of its employes, and also of its passengers.

And whether such rules are adequate to secure the safety of others, and the safe management of its trains, is a question of fact for the jury. *C., B. & Q. R. R. Co. vs. McLallen*, 84 Ill., 109; *Stone vs. C., etc., Rd. Co.*, 47 Ia., 82.

The court further instructs you, that the use of grossly profane and abusive or obscene language, by a passenger in a railway car where there are ladies, is such a breach of decorum, no matter if it is provoked, as will work a forfeiture of his right to be carried as a passenger, and the conductor has a right to cause him to be expelled from the cars, using no more force than is necessary for that purpose. *C., B. & Q. R. R. Co. vs. Griffin*, 68 Ill., 499; *Redfld. on Car.*, § 459; *Vinton vs. Middlesex*, 11 Allen, 304.

A railroad company has a right to prescribe reasonable rules for the government of its employes in the conduct of its business upon its trains, and passengers may be required to conform to such rules, and a rule requiring a conductor to eject from the train a passenger who refuses to produce a ticket or pay his fare on demand is a reasonable one. Whether, in this case, the defendant had such a rule and whether the plaintiff did refuse to produce a ticket or pay his fare on demand, etc., etc., are all questions of fact to be determined by the jury by a preponderance of the evidence. *Crawford vs. Rd. Co.*, 26 Ohio St., 580; *Toledo, W. & W. Rd. Co. vs. Wright*, 68 Ind., 586.

A railroad company may refuse to receive as a passenger, a person who is so intoxicated as to be disgusting, offensive, disagreeable or annoying to the other passengers, generally, so long as he continues in that condition, though he may have purchased a ticket—though a slight intoxication, such as would not seriously affect the conduct of the passenger, would not justify a railroad company in refusing to receive and carry one as a passenger who had purchased his ticket. *Pittsburg, etc., Rd. Co. vs. Van Dyne*, 57 Ind., 576.

§ 6. **Expelling a Person from the Cars.**—The jury are instructed, that if the conductor, or other person in charge of a train of cars, attempts to expel a person, who, by the rules of the company, has no right to ride thereon, he must use no more force than is necessary to accomplish that purpose; and if he does use more force than is necessary, and the person so put off is thereby injured, the company will be liable.

If a person gets on a railroad car, in order to ride without payment of fare and without the consent of the persons in

charge of the train, he may be ejected from the cars, prudently, and in such a manner as not unnecessarily to endanger his personal safety; but if reasonable care and prudence are not exercised, and the person is thereby injured, the company will be liable, and it cannot excuse itself upon the ground that the wrong was mutual. *Breen vs. Tex. & P. Rd. Co.*, 50 Tex., 43.

You are further instructed, that to render a railroad company liable for injuries resulting from an expulsion from one of its cars, it is not incumbent on the person injured to show that actual force or violence were resorted to or used upon his person. If you believe, from the evidence, that threats to use force and violence were made, accompanied by acts of such a character as were reasonably calculated to induce in the mind of an ordinarily rational person the belief that force and violence would be used, unless he leave the train, and plaintiff left in consequence of such threats, then the threats would be equivalent to the use of force and violence, as regards this suit.

If you believe, from the evidence, that the plaintiff was injured by the acts of the conductor of one of defendant's trains, as charged in the declaration, and that such acts were done by the conductor while acting for the company, and within the scope of his employment, as such conductor, then such acts are in law the acts of the railroad company.

§ 7. **Passenger Can Only be Put Off at a Station**—(*Illinois Statute*).—That if a person on a railroad train or car, on reasonable demand, refuse to pay his fare, the conductor of the train may remove such person, or cause him to be removed from the car, at any regular station, but only at a regular station, unless the person to be removed consents to be put off at some other place.

§ 8. **Injuries to Passengers**.—The court instructs the jury, as a matter of law, that railroad corporations are required to use all reasonable precautions for the safety of the traveling public, whether in the construction and operation of their engines and cars, or the erection of their depots, or the construction of their tracks or the approaches to their trains, and

it is their duty to furnish safe approaches to their passenger cars; if any of these are insecure or unsafe, when it could have been avoided, by a reasonable effort and precaution, and injury results, the company will be liable for damages resulting therefrom. *Chi. & A. Rd. Co. vs. Wilson*, 63 Ill., 167.

FENCING TRACK.

NOTE.—The obligation of railroad companies to fence the track of their roads, to give warning at highway crossings, and their liability for damages occasioned by fire escaping from their locomotives, are mainly imposed or regulated by the statutes of the several states; and these statutes differ somewhat in their details. The following instructions can readily be adapted to the statutes of the different states, by making the changes necessary for that purpose.

§ 9. **Failure to Comply with the Law, Negligence per se.**—The jury are instructed, as a matter of law, that if a railroad company, or its servants, fail to perform a duty prescribed by statute or ordinance, such failure is negligence of itself; provided, it is the proximate cause of an injury to the person or property of another. *Penn. Co. vs. Hensil*, 70 Ind., 569; *Thompson, Neg.*, 419, § 1232.

§ 10. **Statutory Provisions—Fencing the Track.**—The jury are instructed, that by the law of this state, every railroad corporation is required, within (*six months*) after any part of its line is open for use, to erect, and thereafter maintain, fences on both sides of so much of its road as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting onto such railroad; except at the crossings of public roads and highways, and within such portions of cities, and incorporated towns and villages, as are laid out and platted into lots and blocks.

If you believe, from the evidence, that the (*horse*) in question got upon the defendant's railroad track upon the occasion referred to, not at the crossing of a public road or highway, and not within any portion of a city, incorporated town or village, which is laid out and platted into lots and blocks, and that that portion of the road had been in operation six months and more, before the accident in question; and if you further believe, that the fence on the side of the track, at the

point in question, through the negligence of the defendant, was out of repair, and was not sufficient to prevent horses getting onto such railroad, and that the (*horse*) got onto the track by reason of the insufficiency of the fence, and was there injured, as charged in the declaration, then it is immaterial whether the company was careful or negligent in running its engine and cars. The neglect to keep up a sufficient fence fixes the liability of the company for all damage to stock occasioned thereby; provided, the owner of the stock is guilty of no fault or negligence contributing to the injury.

If you believe, from the evidence, that the stock in question got upon the defendant's railroad track at a point where the company was, by law, bound to erect and maintain fences, as explained in the preceding instructions; that that portion of the road had been in operation (*six months*) and more, and that the fence, where the stock got upon the track, was, through the carelessness and neglect of the company, not then suitable and sufficient to prevent the stock getting upon the track, and that the stock did, in fact, get upon the track by reason of the insufficiency of the fence, and was there injured and damaged, without any fault or negligence on the part of the plaintiff, then the plaintiff has a right to recover in this suit.

§ 11. **Company Must Exercise Reasonable Care.**—The court instructs the jury, as a matter of law, that when, by the use of ordinary care and diligence, on the part of the servants of a railroad company, animals straying upon its tracks can be saved from injury, then it is the duty of such servants to exercise that degree of care, and a failure to do so, if proved, renders the company liable for any damages thereby sustained. *T., P. & W. Rd. Co. vs. Ingraham*, 58 Ill., 120; *Wharton on Neg.*, § 357; *Parker vs. Rd. Co.*, 34 Ia., 399; *Rd. Co. vs. Smith*, 22 Ohio St., 227.

Although you may believe, from the evidence, that the stock in question got upon the railroad track of the defendant, without any negligence upon the part of the company, still, if you further believe, from the evidence, that the person in charge of the engine, by the exercise of reasonable and ordinary care, and without danger to his engine and train, could have avoided the injury, and did not do so, then the company

would be liable for such injury; provided, that you further believe, from the evidence, that the owner of the stock, or the persons having it in charge, were guilty of no negligence which contributed to such injury. *Wharton on Neg.*, § 893; *Chi. & N. W. Rd. Co. vs. Barrie*, 55 Ill., 226; *Eames vs. S. & L. Rd. Co.*, 98 Mass., 560; *Locke vs. St. Paul, etc.*, 15 Minn., 350; *Needham vs. Railroad*, 37 Cal., 409; *Shepherd vs. Railroad*, 35 N. Y., 641.

The court further instructs you, that when a railroad company fails to fence its track, as required by statute, it must see that its servants so conduct its trains that injuries shall not result to stock that may get upon its track, if it can be done by care and caution. If the company fails to fence its track, it takes upon itself the hazard, and when injury results therefrom it must respond in damage. *Toledo, P. & W. Rd. Co. vs. Lavery*, 71 Ill., 522; *Toledo, W. & W. Rd. Co. vs. McGinnis*, 71 Ill., 346.

§ 12. **Company Only Held to Reasonable Care—Casual Breach in Fence.**—The court instructs the jury, that while railroad companies are not required to keep such a guard on their roads as to see a breach in the fence and repair it the instant it occurs, still the law does require them to keep such a force as will discover breaches and openings in their fences, and to close them within a reasonable time; and if they neglect to do so within a reasonable time, it is a neglect of duty that will render them liable for an injury to stock escaping onto the road through such openings; provided, the owner or the person having the stock in charge is guilty of no negligence which contributed to the injury. *C. & N. W. Rd. Co. vs. Harris*, 54 Ill., 528.

If you believe, from the evidence, that the defendant had erected a fence suitable and sufficient to prevent horses and cattle, sheep and other stock from getting upon the railroad at the point where the animals in question got upon the track, and had maintained the fence in good repair up to (*the evening before the accident*), and that the injury was occasioned by the fence being broken down at the time of the accident, then negligence on the part of the defendant ought not to be inferred, unless you further find, from the evidence, that the

servants of the company knew of the fence being down, or else that it had been down for such a length of time that, in the exercise of reasonable care and watchfulness, they ought to have known of its being down, and failed to repair it within a reasonable time thereafter. *C. & A. Rd. Co. vs. Umphenour*, 69 Ill., 198.

The court further instructs you, as a matter of law, that when a railroad is inclosed by a suitable and sufficient fence, and a casual breach occurs therein, without the knowledge or fault of the company, and through such breach stock get upon the track and are injured, the company is not liable, unless it has had a reasonable time to discover such breach, or has been notified and fails to repair within a reasonable time, and before the injury occurred. *Shearm. & Redfield on Neg.*, 517; *Robinson vs. The Grand Trunk Rd. Co.*, 32 Mich., 322; *Davis vs. Chicago, etc., Rd. Co.*, 40 Ia., 292; *Indianapolis, etc., Rd. Co. vs. Truitt*, 24 Ind., 162; *Ind. & St. Louis Rd. Co. vs. Hall*, 88 Ill., 368.

If you believe, from the evidence, that on (*the day before the injury*) the defendant had a good and sufficient fence to prevent horses, cattle, sheep, hogs and other stock from getting onto the track, at the point in question, and that after that it was blown down, or broken down by trespassers, or otherwise, without the fault of the defendant, and that while the fence was so down, the plaintiff's stock got through the broken fence and was injured, before the defendant had a reasonable time in which to repair it, then the defendant would not be liable for injuries resulting from the fence being out of repair.

If you believe, from the evidence, that defendant had a good and sufficient fence on the side of its road, through plaintiff's farm or pasture, until shortly before the accident, and that it was broken down by trespassers, or by unruly stock, or blown down by wind, and that plaintiff's horses got through the fence before defendant had reasonable time to repair it, then you should find for the defendant.

The court further instructs you, that when a railroad company builds and maintains a good and sufficient fence through a farm, and it is blown down, burnt down, or thrown down by trespassers, and without the fault of the railroad company, then the company has a reasonable time in which to repair the

fence, and it is not responsible for any damages which may ensue solely from the insufficiency of the fence until such reasonable time has elapsed. *I. C. Rd. Co. vs. Swearingen*, 47 Ill., 206; *Gill vs. Rd. Co.*, 27 Ohio St., 240.

§ 13. **Stock Unlawfully Running at Large.**—The court instructs the jury, that at the time in question it was unlawful to permit cattle or horses to run at large, at and within, etc., and if the jury believe, from the evidence, that the plaintiff voluntarily permitted the horse in question to run at large, at and within, etc., and under such circumstances that it might reasonably have been foreseen or anticipated that the horse might get upon the defendant's track, then the plaintiff cannot recover of the defendant for the killing of the horse by one of its trains, upon the ground alone that the company had failed to fence its track at the place where the animal was killed. Wharton on Neg., § 900; *P. P., & J. Rd. Co. vs. Champ*, 75 Ill., 577; *Indiana Rd. Co. vs. Shimer*, 17 Ind., 295; *Jef., etc., Rd. Co. vs. Adams*, 43 Ind., 402; *Pearson vs. Milwaukee, etc.*, 45 Ia., 496.

The fact that the owner of stock permits it to run at large, in violation of the act prohibiting domestic animals from running at large, does not relieve railroad companies from their duty to fence their roads, nor from their liability for stock injured in consequence of their failure to do so; and the question whether the owner of the stock has been guilty of contributory negligence in permitting them to run at large, is one of fact to be determined by the jury from all the circumstances of the case. And to render the owner of the stock guilty of contributory negligence, in permitting his stock to run at large, it must appear, from the evidence, that he did so under such circumstances that the natural and probable consequence of so doing was that the stock would go upon the railroad track and be injured. *Ewing vs. Chicago & A. Rd. Co.*, 72 Ill., 25.

The court instructs you, that the fact, if proved, that the plaintiff permitted his stock to run at large, in violation of the law prohibiting domestic animals from running at large, does not relieve the defendant from its duty to maintain a suitable and sufficient fence along the line of its road, if you find, from the evidence, under the instructions of the court, that the de-

defendant was otherwise bound to do so; nor from liability for stock injured in consequence of its failure to do so, if you find, from the evidence, under the instructions of the court, that the defendant is otherwise liable therefor. *Rd. Co. vs. Lull*, 28 Mich., 510; *L. N. A. & C. vs. Whitesell*, 68 Ind., 297; *White vs. Utica, etc., Rd. Co.*, 15 Hun, 333; *Cairo Rd. Co. vs. Murray*, 82 Ill., 76.

The question whether the plaintiff was guilty of contributory negligence in permitting his cattle to run at large, is one of fact to be determined by the jury from all the circumstances of the case. And to render him guilty of contributory negligence, in permitting his stock to run at large, the jury must believe, from the evidence, that he did so under such circumstances that the natural and probable consequence of so doing was, that the stock would go upon the railroad track and be injured.

In the absence of an order of the county commissioners (or a vote of the inhabitants, etc.) permitting stock to run at large, the plaintiff was in duty bound to keep his stock on his own premises, or to use all ordinary and reasonable means and appliances for that purpose, and if he knowingly and voluntarily suffered his stock to run at large, in the immediate vicinity of that part of defendant's road where it was not bound by law to fence, as explained in these instructions, and if you further believe, from the evidence, that the (colts), while so suffered to run at large, got upon the track of defendant's road at a point where it was not bound by law to fence as explained, etc., and were then killed, the plaintiff cannot recover unless such killing was willful or wantonly reckless. *Ind. & C. & L. Rd. Co. vs. Harter*, 38 Ind., 557; *Eames vs. S. & L. R. Co.*, 98 Mass., 560.

§ 14. **Obligation to Fence not Limited to Adjoining Owner.**—The obligation to construct and maintain fences upon both sides of their roads, imposed by the laws of this state upon railroad companies, is not limited to owners and occupiers of adjoining lands, but extends to the public generally.

Where cattle running at large without the fault of the owner, enter the inclosed field of another person through which a railroad passes, and thence go upon the track of the road by reason of a want of sufficient fence, and are injured,

the railroad company will be liable, provided they have not built a good and sufficient fence (according to the statute) or had allowed the fence to become out of repair after notice thereof, and a reasonable time for its repair. *Rd. Co. vs. Stephenson et al.*, 24 Ohio St., 48.

§ 15. **Cattle Guards.**—In order to keep its road securely fenced, the statute of this state requires a railroad company to construct and keep in repair cattle guards on each side of its track at all highway crossings. And in this case, if the jury believe, etc. *Pittsburg, C. & St. L. Rd. Co. vs. Eby*, 55 Ind., 567

§ 16. **Plaintiff's Contributory Negligence.**—The jury are instructed, that when a railway company fences its track, as required by statute, and the fence afterwards becomes defective, an action against the company for injuries to horses or cattle straying upon the track, through such defective fence, cannot be maintained, if it appears that the owner of the animals was guilty of negligence, which naturally and directly contributed to such injury. *Jones vs. The Sheboygan & Fond du Lac Rd. Co.*, 42 Wis., 306.

§ 17. **Stock Escaping and Running at Large.**—If the jury believe, from the evidence, that the horse in question broke out of the pasture and went upon the railroad track, without any fault or negligence on the part of the plaintiff, and was there killed, and that such killing was the result of negligence, and of a want of ordinary care and reasonable caution on the part of defendant's servants, then the plaintiff was not guilty of such contributory negligence as will prevent a recovery in this case. *T., P. & W. Rd. Co. vs. Johnson*, 74 Ill., 83.

§ 18. **What the Plaintiff Must Prove to Recover.**—The court instructs the jury, that to entitle the plaintiff to recover, he must prove every material allegation in his declaration, by a preponderance of evidence. The jury must believe, from the evidence, that the place where the animal got upon the track was at a point where the defendant was bound by law to fence; that is, that it (was not at the crossing of a public road or

highway, and was not within that portion of any city, incorporated town or village, which is laid out and platted into lots and blocks); and further, that defendant's road, at that point, had been in operation (*six months*) or more, and that the fence, through the negligence or carelessness of the defendant, was not sufficient to turn horses, cattle and other stock; and if the plaintiff has failed to prove either of these things, by a preponderance of evidence, the jury should find for the defendant.

INJURIES BY FIRE.

§ 19. **Prima Facie Negligence.**—The court instructs the jury, that if they believe, from the evidence, that the plaintiff's property was injured by fire, caused by fire or sparks escaping from defendant's locomotive, while passing along the railroad, in manner and form as charged in the plaintiff's declaration, then, under the laws of this state, these facts make a *prima facie* case of negligence against the defendant; and the burden of proof is then upon the defendant to rebut this *prima facie* case, by showing affirmatively that at the time in question the engine was properly constructed and equipped with the best approved appliances for preventing the escape of fire; that these appliances were all in good repair and condition, as regards the escape of fire, or that all reasonable care and caution had been taken to keep them in such repair and condition, and that the engine was carefully and skillfully handled, as regards the escape of fire therefrom; provided, the plaintiff was guilty of no fault or negligence contributing to the injury. *P., C. & St. Louis Rd. Co. vs. Campbell*, 86 Ill., 443; *Kellogg vs. C. & N. W. Rd. Co.*, 26 Wis., 223; *Kesee vs. C. & N. W.*, 30 Ia., 78; Cooley on Torts, 661. *Contra*: Wharton on Neg., § 868-870.

§ 20. **Reasonable Care Required to Prevent Spread of Fire.**—It is the duty of a railroad company to take all reasonable precautions to prevent the spread of fire from its locomotives. And while property owners adjoining take the risk of injuries unavoidably produced by fire used for generating steam, yet, for any negligence in the use of it, the company will be liable.

Proof of the destruction of property, by fire escaping from

a locomotive, raises a *prima facie* case of negligence, which the defendant must rebut by showing the absence of negligence, by a preponderance of evidence, or that the plaintiff's own fault or negligence contributed to the injury. *Coale vs. Hannibal, etc., R. R. Co.*, 60 Mo., 227.

If the jury believe, from the evidence, that plaintiff's property was injured by fire escaping from defendant's engine, while passing along the railroad, as charged in plaintiff's declaration, then this makes a *prima facie* case of negligence against the defendant; and it is not enough to rebut this *prima facie* case to show that the engine was originally constructed with the best and most approved appliances and improvements to prevent the escape of fire. The law imposes upon the company and its employes the duty of keeping a vigilant, careful watch to see that the engine is kept in proper repair, so as not to be unnecessarily dangerous to property in the vicinity of the road; and unless the defendant has shown, by a preponderance of evidence, that the engine in question was in such good repair and condition at the time of the injury complained of, or that all reasonable precautions had been taken to have it in such repair and condition, then the defendant has not rebutted such *prima facie* case made against it; provided the jury believe, from the evidence, that the plaintiff's own fault or negligence did not contribute to the injury. *C. & A. Rd. Co. vs. Quaintance*, 58 Ill., 389

§ 21. **Must Provide Most Improved Apparatus to Prevent Escape of Fire.**—The jury are instructed, that railroad companies are required by law to keep constantly in use the most approved machinery and apparatus to prevent the escape of fire from their engines, to the injury of property along their lines, so far as this can be done by the exercise of all reasonable care, skill and vigilance. *T., P. & W. Rd. Co. vs. Pindar*, 53 Ill., 447; *C. & A. R. R. Co. vs. Pennell*, 94 Ill., 449; *C. & A. R. R. Co. vs. Quaintance*, 58 Ill., 389.

The law does not require a railroad company to provide and use the very best known appliances that mechanical skill and ingenuity have been able to devise and construct to prevent the escape of sparks from its locomotives, but they are required to use all reasonable means to that end, and where a new improve-

ment of such appliances has been made, or a new invention introduced, which has been tested and generally approved as better than that it is using, it is required to adopt and use the better appliances. *Toledo W. & W. Rd. Co. vs. Corn*, 71 Ill., 493.

The court further instructs the jury, that no matter what mechanical appliances were on the smoke-stack, or engine, to prevent the escape of fire, if the jury believe, from the evidence, that the fire got out through the negligence of the defendant's engineer or fireman, in such case the defendant would be liable, and the jury should find the issues for the plaintiff; provided, the jury further find, from the evidence, that the plaintiff's own negligence did not contribute to the spread of the fire.

If the jury believe, from the evidence, that at the time in question the fire escaped from defendant's engine, through the negligence of its servants and employes, and was thereby communicated to the fence and fields of the plaintiff, and further, that the plaintiff's own negligence in no manner contributed to the starting or spread of the fire, then the jury should find for the plaintiff, and assess his damages at such an amount as the evidence shows the plaintiff has sustained by reason of the fire.

If the jury believe, from the evidence, that the fire in question originated from defects in the construction of defendant's engine, which might have been remedied or prevented by the exercise of reasonable care and skill, then the defendant is liable for all the damage caused by such fire, so far as the same has been proved, if any has been proved; provided, the jury further believe, from the evidence, that the plaintiff's own fault or negligence in no manner contributed to the lighting or spreading of such fire.

If the jury believe, from the evidence, that the defendant's servants, in charge of the engine, did not exercise reasonable care and caution in the running and management of the said engine, and that the fire in question was caused by their failure so to do, then the defendant is liable for all the damage, if any, sustained by the plaintiff, and occasioned by said fire; provided, the jury further believe, from the evidence, that the plaintiff's own fault or negligence in no manner contributed to the lighting or spreading of said fire.

§ 22. **Dry Weeds and Grass.**—If the jury believe, from the evidence, that the defendant, negligently and carelessly, allowed dry grass, weeds, and other combustible material, to accumulate on its right of way adjoining plaintiff's premises, so as to unnecessarily increase the hazard from fire, and that by reason of such accumulation of combustible material, the fire was kindled, and communicated to the fence and field of the plaintiff, and further, that the plaintiff's own negligence in no manner contributed to the kindling or the spreading of the fire, then the jury should find for the plaintiff the amount of damages, if any, which are proved to have resulted from said fire. And in such case it makes no difference whether the best appliances to prevent the escape of fire were or were not used on the engine from which the fire escaped, if the jury believe, from the evidence, that the fire did escape from defendant's engine. *Flynn vs. San Francisco Rd. Co.*, 40 Cal., 14; *Martin vs. W. U. Rd. Co.*, 23 Wis., 437; *Hwey vs. Nourse*, 54 Me., 256; *Ingersoll vs. Stockridge, etc., Rd. Co.*, 8 Allen, 438; *I. C. Rd. Co. vs. Nunn*, 51 Ill., 78; Wharton on Neg., § 873; *Poepper vs. M. etc., Rd.*, 67 Mo., 715; *Jones vs. M. C. R. R. Co.*, 59 Mich. 437.

If the jury believe, from the evidence, that anyone or more of the fires which are complained of by the plaintiff in this case, were caused by, or originated from, defects in the construction of the defendant's engine, which might have been remedied by the exercise of reasonable and ordinary care and skill, or from the carelessness of the defendant's servants in charge of the engine, and that the plaintiff was damaged thereby as charged in the declaration, and that the plaintiff was guilty of no negligence which contributed to the injury, then the jury should find the issues for the plaintiff, and assess his damages at such a sum as they believe, from the evidence, he has sustained from such careless or negligent acts.

§ 23. **Degree of Care Required of Land Owner.**—The court instructs the jury, that the owner of land adjoining a railroad track is as much bound to keep his land free from unusual and dangerous accumulations of combustible matter as a railroad company is its right of way. And if the owner or occupant permits an unusual and dangerous accumulation of dead grass,

dry leaves, or other combustible material to accumulate on his land next to the company's right of way, and a fire is ignited on the right of way, and is thence communicated to the fields adjoining, by means of such unusual and dangerous accumulations of combustible material, then the negligence of the owner will be held to have contributed to the loss and injury, and in such a case the owner of the property injured cannot recover for such injury, unless the jury believe, from the evidence, that his negligence was but slight, and the negligence of the railroad company was gross, as explained in these instructions. *C. & N. W. vs. Simonson*, 25 Ill., 504; *Ohio & M. Rd. Co. vs. Shanefee*, 47 Ill., 497.

The jury are instructed, that in determining the question, whether or not the defendant was guilty of negligence, which contributed to the fire in question, in permitting grass, dry weeds or leaves to accumulate within its right of way at the point where the fire in question occurred, the jury should consider and determine from the evidence, whether the defendant permitted such an accumulation of dry grass, weeds and leaves or other combustible material upon its right of way at the point in question, as would not have been likely to be permitted by an ordinarily careful and prudent man upon his own premises, if his property were exposed to the same hazard. *Snyder vs. Pittsburg, etc., Rd. Co.*, 11 W. Va., 14.

The court instructs you, as a matter of law, that it is not negligence on the part of the owner, or occupant, of property injured by fire escaping from an engine passing along a railroad, that he has used the property in the manner, or permitted the same to be used, or remain in the condition in which it would have been used or remained, had no railroad passed through or near it. *Flynn vs. San Francisco & San Jose Rd. Co.*, 40 Cal., 14; *Kellogg vs. C. & N. W. Rd. Co.*, 26 Wis., 223; *Rd. Co. vs. Salmon*, 39 N. J. L., 299.

The court instructs you, that the defendant was not bound to furnish the very best or most improved kind of machinery or apparatus to prevent the escape of fire from its engine; and if you believe, from the evidence, that the engine, etc., connected with the same were reasonably safe, and such as are ordinarily used for the purpose for which these were intended, and that the defendant was not otherwise guilty of negligence, then the defendant would not be liable in this case.

Although you may believe, from the evidence, that an improvement has been made and patented upon engines similar to the one in question, or upon the apparatus used in connection therewith, for preventing the escape of fire, yet the defendant was not, on that account, bound to purchase or use such improvement; the defendant was only under obligation to use reasonable and ordinary care in providing suitable and safe machinery, and to provide such as was reasonably safe. Wharton on Neg., § 635, 822; *Camp Point Mfg. Co. vs. Ballou*, 71 Ill., 417.

§ 24. Reasonable Care and Diligence only Required by the Company.—The court instructs the jury, that railroad companies are only bound to exercise reasonable diligence and care to prevent fire or sparks from escaping from their locomotives, while running on their roads, and in keeping their track or right of way free and clear from combustible material, so as to prevent injury by fire to farms or property along the lines of their roads; and, in this connection, reasonable care and diligence is such care and diligence as a careful, prudent and skillful man would observe, under like circumstances, to prevent injury to his own property, equally exposed; and if the jury believe, from the evidence, that the defendant, in this case, did exercise all such reasonable care, diligence and skill to prevent injury, by a fire, to the property of the plaintiff, that is all the law required, and the defendant is not guilty of negligence.

Although you may believe, from the evidence, that the fire in question originated on defendant's right of way, by reason of fire escaping from one of its engines, still, if you further believe, from the evidence, that such engine was properly constructed, and had all the most approved appliances and inventions for preventing the escape of fire, and that the defendant exercised all reasonable care, diligence and watchfulness to keep the same in repair, and further, that the defendant used all reasonable care and diligence to prevent dry weeds and grass, and other combustible materials, from accumulating on and near its right of way where the fire originated, and also that defendant's servants used all such care and diligence, both in running and managing the engine, and in keeping the track

clear to prevent fires, as prudent and careful men are accustomed to use under like circumstances, then you should find the defendant not guilty.

Though you may believe, from the evidence, that the plaintiff's timber and grass were injured by reason of fire escaping from defendant's engine, as charged in the declaration, still, the defendant is not liable therefor, if you further believe, from the evidence, that the engine in question and its appliances for preventing the escape of fire, were the most approved construction, and were then in good condition and repair, as regards the escape of fire; and provided, you further believe, from the evidence, that the defendant, its agents and servants, were not guilty of any neglect of reasonable care in reference to the lighting or spread of said fire.

The jury are instructed, as a matter of law, that although they may believe, from the evidence, that sparks from defendant's engine set fire to plaintiff's barn, as alleged in the declaration, still, if the evidence further shows that the engine was in good condition, protected by all modern improvements and appliances to prevent the escape of fire, not out of repair, that the engineer in charge of the same was competent and skillful, that he handled the engine in a proper and skillful manner, then the law is for the defendants, and the jury have no discretion in the matter, and they should find the defendant not guilty.

Although the jury may believe, from the evidence, that the injury complained of was caused by sparks escaping from defendant's locomotive, this alone is not sufficient to prove negligence on the part of defendant. In order to warrant a verdict in this case, the jury must believe, from the evidence, not only that the injury was caused by sparks escaping from defendant's engine, but it must further appear from a preponderance of the evidence, that the defendant was guilty of negligence in permitting such sparks to escape, or in permitting (as alleged in the declaration). *Ruffner vs. C., etc., Rd. Co.*, 34 Ohio St., 96.

If the jury believe, from the evidence, that the defendant constructed a highway crossing at the point in question, and that, taking into account the location, nature of the ground and all the surroundings of the place, the crossing was con-

structed in such a manner as to render it easy to approach and cross by travelers and teams on the highway, without danger to persons using reasonable and ordinary care, then the defendant did all that was required of it in making the crossing, and would not be guilty of negligence, as regards the manner of constructing the crossing. *Ind., St. L. Rd. vs. Stout*, 53 Ind., 143.

HIGHWAY CROSSINGS.

§ 25. **Must be put in Safe Condition.**—By the law of this state, every corporation owning or operating a railroad in this state, is required to construct reasonably safe crossings at all points where it intersects a public highway; and it is liable for all injuries resulting from neglect of this duty, if the party injured is guilty of no negligence contributing to such injury. *Farley vs. The C., R. I., etc., Rd. Co.*, 42 Ia., 234.

§ 26. **Reasonable Care Required at Highway Crossings.**—The jury are instructed, that although a person may be improperly or unlawfully upon a railroad track, that fact alone will not discharge the company or its employes from the observance of reasonable care; and if such a person is run over by the train, and killed or injured, the company will be responsible, if its employes could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness. *Isabel vs. Hannibal, etc., Rd. Co.*, 60 Mo., 475.

§ 27. **Negligence of Driver.**—According to the admitted facts in this case, the plaintiff (or deceased), at the time of the accident, was being driven across the railroad track by one E., in a lumber wagon, and you are instructed by the court, if you believe, from the evidence, that there was any negligence on the part of the driver of the wagon, which contributed to the injury in question, then that negligence has the same effect on the plaintiff's right to recover as if the negligence had been that of the plaintiff (or deceased) himself. *Lake Shore & Mich. Southern Rd. Co. vs. Miller*, 25 Mich., 274.

If the jury believe, from the evidence, that the driver of the wagon was employed by the plaintiff to drive, etc., and

that there was negligence on the part both of the defendant and of the driver, which contributed directly to the accident, then the jury have no right to strike a balance between them, so as to find a verdict for the plaintiff, but in such case the jury should find a verdict for the defendant.

If you believe, from the evidence, that the defendant was guilty of negligence or a want of ordinary care and skill in the construction of its track at the road crossing in question, and that the plaintiff was injured thereby in attempting to cross the track, and that he was not himself guilty of any negligence that contributed directly to such injury, and that such injury caused his death, then your verdict should be for the plaintiff. *Ind. & St. L. R.R. Co. vs. Stout*, 53 Ind. 143.*

The jury are instructed, that the defendant had a right to build its road across the highway described in the complaint, but, in doing so, it was required to restore the highway to its former state of usefulness, so far as it was reasonably practicable, and so as not unnecessarily to impair the usefulness of the highway or render it unnecessarily dangerous in crossing. But whether, in this case, the defendant was guilty of a want of ordinary care and skill, etc., etc., are questions of fact to be determined by the jury from all the evidence in the case.

If you believe from the evidence, that the driver of the team was guilty of any degree of negligence, which contributed directly to the injury, then the jury should find for the defendant, even though you believe, from the evidence, that the negligence of the defendant, in some measure, caused the injury complained of.

Although the jury may believe, from the evidence, that at the time of the injury complained of, the plaintiff was riding in a wagon driven by one A. B., and that the said A. B., as such driver, was guilty of negligence which contributed directly to the injury complained of, still, if the jury further believe, from the evidence, that the plaintiff was merely riding for pleasure with the said A. B., and upon his invitation, and that the plaintiff had no right nor authority to control the movements of the said horses and wagon or their driver, and did not exercise any such control, then the contributory negligence of the driver would not prevent a recovery by the plaintiff in this suit, provided the jury further believe, from

the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff was injured thereby, and also, that the plaintiff was not himself guilty of any negligence which contributed to the injury *Dyer vs. Erie Rd. Co.*, 71 N. Y., 228.

§ 28. **Signals to be Given at Road Crossings.**—The court instructs the jury, that, by the laws of this state, every railroad company is required to have a bell of at least (30) pounds weight and a steam whistle placed and kept on each locomotive, and to cause the same to be rung or whistled at the distance of, at least, (*eighty*) rods from the place where the railroad crosses a public highway, and to keep the same ringing or whistling until the highway is reached.

If the jury believe, from the evidence, that the defendant's agents or servants in charge of the engine in question, omitted to ring a bell or sound a whistle continuously for the distance of (*eighty*) rods before reaching the highway crossing, such omission constitutes a *prima facie* case of negligence on the part of the defendant; and if the jury further believe, from the evidence, that the plaintiff was struck and injured at the railroad crossing in question, as charged in the declaration, in consequence of the omission to ring the bell or sound the whistle, while he was himself exercising all reasonable care and caution, in that behalf, then the defendant is liable to the plaintiff for the loss and damage sustained by him, by reason of such injury, if any such loss or damage has been proved.

The jury are instructed, as a matter of law, that the omission by the defendant, or its servants, to ring the bell or sound the whistle at public crossings, if proved, is not of itself sufficient to authorize a recovery by a party injured, if the jury believe, from the evidence, that the complaining party might, by the exercise of ordinary care, have avoided the accident, notwithstanding such omission.

§ 29. **Rights and Liabilities of Railroad Companies and Travelers are Equal and Mutual.**—The court instructs the jury, that railroad companies, under their charters, have the same rights to use that portion of the public highway over which their track passes as the public have to use the same highway.

Their rights and those of the public, as to the use of the highway at such point of intersection, are mutual and reciprocal; and, in the exercise of such rights, both the company and those using the highway must have due regard for the safety of others, and use every reasonable effort to avoid injury to others. *Ind. & St. Louis Rd. Co. vs. Stables*, 62 Ill., 313; *Shearm. & Red. on Neg.*, § 481; *Penn. Rd. Co. vs. Heileman*, 49 Penn. St., 60; *Cleveland, etc., Rd. Co. vs. Terry*, 8 Ohio St., 570.

The jury are instructed, that if a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require reasonable care and caution of those traveling on the other road to avoid a collision; that while a passing train, from its force and momentum, will have the preference in crossing first, yet those in charge of it are bound to give reasonable warning, so that a person about to cross with a team and wagon may stop and allow the train to pass, and such warning must be reasonable and timely, so far as the circumstances will reasonably admit of. *C., B. & Q. Rd. Co. vs. Lee*, 87 Ill., 454.

If the jury believe, from the evidence, that the injury complained of was occasioned by a collision between the team and wagon of the plaintiff and a locomotive engine of the defendant, on a public road, at a place where such road crossed the railroad of the defendant, and that the plaintiff used ordinary care and caution to avoid a collision, and that the collision was owing to the negligent, careless and unskillful manner in which the servants of the defendant managed the locomotive and train of cars attached, as charged in the declaration, then the jury should find a verdict for the plaintiff.

The court further instructs the jury, that if they believe, from the evidence, that the engineer or fireman on the locomotive which struck the wagon of the deceased, and caused his death—if they believe, from the evidence, his death was so caused—could, by the exercise of reasonable care and watchfulness, have seen the deceased in time to have stopped said engine, and avoided the injury, without danger to themselves or train, then the railroad company is liable for the want of such care and watchfulness, and the injury occasioned thereby; provided, the jury further believe, from the evidence, that

the deceased was, at the time, exercising all reasonable care and caution to avoid the injury. *Chi. & Alton Rd. Co. vs. Murray*, 62 Ill., 326.

The defendant's servants in this case were not bound to use extraordinary care or extraordinary means to prevent accidents, they were only bound to use what in that peculiar business is ordinary care and diligence, and the paramount duty of the employes on the train was the protection of the passengers, the property in the train and the train itself. If you believe, from the evidence, that in the usual and ordinary management of the train for the safety of the passengers and property, the engineer had to perform other duties besides watching the track ahead, such as gauging his steam, watching his time table, examining his machinery, watching for the station signals, then he had a lawful right to perform these duties, and he was not bound to neglect them in order to watch the track ahead while performing his duties. And if the jury find, from the evidence, that the engineer in charge of the engine was attending to any or all of these duties at the time of the accident, and that for this reason the stock was not discovered in time to save them by using ordinary means to stop the train, then the defendant is not liable. *Rd. Co. vs. Smith*, 22 Ohio St., 227.

§ 30. **Company Must not Suffer Tall Weeds or Brush to Obstruct the View of the Track.**—The court instructs the jury, that it is negligence in a railroad company to permit or suffer brush or tall weeds to grow upon its right of way, so as materially to obstruct the view of the track or approaching trains by persons about to cross the track; and, in this case, if the jury believe, from the evidence, that the defendant permitted and suffered brush and tall weeds to grow upon its right of way, so as to obstruct materially the view of the track and of approaching trains by persons about to cross the railroad on the crossing in question, and that but for such obstruction the injury in question would not have happened, then the company is liable, in this case, unless the jury further believe, from the evidence, that the plaintiff's own negligence directly contributed to the injury. Wharton on Neg., § 386; *O'Mara vs. Hudson River Rd. Co.*, 38 N. Y., 445; *Artz vs. C., etc., Rd.*

Co., 34 Ia., 153; *Ind., etc., Rd. Co. vs. Keeley*, 23 Ind., 133; *Tabor vs. Mo. V. Rd. Co.*, 46 Mo., 353; *I. & St. Louis vs. Smith*, 78 Ill., 112.

If the jury believe, from the evidence, that the plaintiff was free from negligence, on his part, in attempting to cross the track of the railroad, and that the defendant's servants in charge of the engine were guilty of negligence, either in running over the crossing in question at a greater speed than was usual, and than was reasonably safe to persons about to cross the track, or in not ringing the bell or sounding the whistle continuously for the distance of (*eighty*) rods before reaching the crossing, and that by reason of such negligence the plaintiff or his property was injured, and the plaintiff thereby damaged, then the jury should find the issues for the plaintiff.

§ 31. **Care Required of Travelers.**—The jury are instructed, as a matter of law, that both the plaintiff (*or the deceased*) and the railway company had an equal right to cross the street at the point where the accident happened, and that the law imposes upon both parties the duty of using reasonable and prudent precautions to avoid accident and danger; and, while it was incumbent upon the railway company, in running its train on the occasion referred to, to give the required signal by ringing the bell or sounding the whistle (*eighty*) rods before reaching the crossing, it was also the duty of the plaintiff (*or deceased*) to look out for the approach of the train, and to observe all reasonable precautions before attempting to cross the track.

Every person is bound to know that a railroad crossing is a dangerous place, and he is guilty of neglect unless he approaches it as if it were dangerous. And if the jury believe, from the evidence, that the plaintiff (*or the deceased*), as he approached the railroad track, did not look or listen to ascertain if a train was coming, and observe all reasonable precautions to avoid danger, but, on the contrary, drove directly onto the track, where the accident happened, without taking any steps to ascertain if a train was approaching, then he was guilty of such negligence as precludes a recovery in this case, unless the jury believe, from the evidence, that the servants

of the railway company, upon such occasion, were guilty of gross negligence, as explained in these instructions. *Lake Shore Rd. Co. vs. Miller*, 25 Mich., 274; *C. & N. W. Rd. Co. vs. Hatch*, 79 Ill., 137; *Davis vs. N. Y. Cent.*, 47 N. Y., 400; *Allyn vs. Railroad*, 105 Mass., 77; *Bellefontaine Rd. Co. vs. Hunter*, 33 Ind., 353; *Penn. Rd. Co. vs. Beale*, 73 Penn. St., 504.

A person about to cross the track of a railroad, upon a public highway, is bound to exercise all reasonable care and caution to avoid injury upon the crossing. In his approach to the crossing, it is incumbent upon him to exercise care and caution by looking and listening for any train that may be approaching, so as to avoid a collision; otherwise he cannot recover for an injury so received, unless it appears that the injury was inflicted willfully or wantonly (*or through gross negligence*). *Hearne vs. Southern, etc., Rd. Co.*, 50 Cal., 482; *Toledo, etc., Rd. Co. vs. Shuckman*, 50 Ind., 42; *Haines vs. Ill. Cent. Rd. Co.*, 41 Iowa, 227.

The court instructs the jury, as a matter of law, that it is the duty of a person approaching the crossing of a railroad, with a wagon and team, along a highway, to listen and to look both ways along the railroad before going upon it. If, from a rise in the ground or other obstructions, or if, by reason of a defect of his sense of sight or hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping, and, if necessary, going in advance of his team to examine, it is his duty to do so. If, in such case, he goes upon the track without taking such precaution, he does so at his own peril, and cannot recover, if injury results. *C., B. & Q. Rd. Co. vs. Lee*, 87 Ill., 454; *Dolan vs. Delaware*, 71 N. Y. 285.

§ 32. **Care Must be Proportioned to Known Danger.**—If the jury believe, from the evidence, that where the public highway crossed the railroad track, and where the accident happened, was a difficult place to cross with a loaded team, and that the said A. B. was acquainted with the place and the difficulty of crossing, then he was bound to use reasonable care and caution to avoid injury, and that the degree of care and caution required of him was such as would have been reason-

ably proportionate to the known difficulty and danger in crossing.

§ 33. **Contributory Negligence—Gross Negligence.**—The jury are instructed, that if they believe, from the evidence, that the said A. B. was guilty of negligence, which materially contributed to the accident, by driving upon the track of the railroad without first looking and listening to see if a train was approaching, then the defendant cannot be found guilty in this case, unless the jury believe, from the evidence, that the defendant's servants were guilty of gross negligence, which caused the accident. And the jury are instructed, that in this connection gross negligence means a willful act or omission, or one which shows a reckless disregard of life or property.

The court further instructs the jury, that while a traveler on the highway is not required to leave his wagon, or to use any other unusual means to discover an approaching train, he cannot voluntarily close his eyes to danger, or needlessly expose himself to it, and then claim compensation for an injury thus received. And if the jury believe, from the evidence, that the said A. B., if he had looked, could have seen the approaching train, for a distance of, etc., before the train reached the crossing, and that either he did not look, or else paid no attention to the train, but went upon the track while the train was approaching, and so near to the crossing as to cause the accident, then he was guilty of gross negligence, and cannot recover in this suit. *Rockford, etc., Rd. Co. vs. Byam*, 80 Ill., 528; *Benton vs. Cent. Rd. Co.*, 42 Ia., 192; *Cleveland, etc., Rd. Co. vs. Elliott*, 28 Ohio St., 340; *Fletcher vs. Atlantic, etc., Rd. Co.*, 64 Mo., 484.

If the jury believe, from the evidence, that the defendant's employes sounded the whistle, or rung the bell of the engine for (*eighty*) rods before reaching the crossing, and used all such ordinary care and diligence as is generally used by careful and skillful engineers, brakemen, and employes of railroad companies under like circumstances, and if the jury further believe, from the evidence, that the said A. B. was sitting on his wagon, with his back turned in the direction of the approaching train, so as to prevent his seeing it, and that he could have seen the train in time to avoid the injury if he had turned and

looked in the direction of the approaching train, then the jury must find the defendant not guilty.

The court instructs the jury, as a matter of law, that it was the duty of the deceased, in approaching the railroad crossing, to have exercised that degree of care and prudence for his personal safety, which an ordinarily prudent man would do, and if the jury believe, from the evidence, that the deceased, by the exercise of that degree of care and prudence, could have discovered the approaching train in time to stop his team and avoid the collision, then the plaintiff cannot recover, unless the jury find, from the evidence, that the injury was caused by the willful conduct of the person in charge of the engine, or by conduct so utterly reckless as to show an utter disregard for the life of the deceased. *C., B. & Q. Rd. Co. vs. Lee*, 68 Ill., 576.

The defendant's servants in charge of the engine which struck the deceased had a right to assume that he was rational, and would exercise reasonable care and caution to keep himself out of danger until they saw something in his conduct which was inconsistent with such assumption. And if the jury believe, from the evidence, that when the persons in charge of the engine first came in sight of the deceased, he was so far removed from the track as to be free from danger of collision, then they had a right to assume that he would remain at such safe distance, unless there was something in the circumstances calculated to rebut such presumption, or until he manifested a purpose to place himself in a dangerous position. *Chicago, R. I. & P. Rd. Co. vs. Austin*, 69 Ill., 426.

§ 34. *Negligence per se in Traveler.*—The court instructs the jury, as a matter of law, that it is not the exercise of ordinary care and prudence for a person to drive with a team directly onto a railroad crossing, without making an effort, by stopping or listening, or otherwise, to ascertain whether a train is approaching, or whether it is safe to drive onto the track with his team.

The jury are instructed, that ordinary care and caution is that degree of care and caution which persons of common prudence are accustomed to exercise for their own safety, and in this case the driver was bound to use that degree of care

and caution to avoid injury; and if the jury believe, from the evidence, that by the exercise of that degree of care and caution on his part, the injury complained of might have been avoided, then the plaintiff cannot recover in this suit.

If the jury believe, from the evidence, that the driver of the wagon, before he drove onto the crossing, knew that he was approaching and about to cross the railroad track at the time in question, and that by looking and listening he might have discovered the train in time to have avoided the injury, and he did not make any effort by looking, listening or otherwise, to ascertain whether a train was approaching, but drove directly onto the track as he approached it, then this was such negligence on his part as will prevent a recovery by the plaintiff in this suit. *Rd. Co. vs. Elliott*, 28 Ohio, 340; *Rd. Co. vs. Crawford*, 24 Ohio St., 631; *Penn Co. vs. Rathgab*, 32 Ohio St., 66.

§ 35. **Conduct in Presence of Sudden Danger.**—The jury are instructed that in the face of sudden, unexpected and deadly danger, a person is not expected or required to be cool and collected, and to act with perfect prudence and deliberate judgment; in such case he is only required to use such degree of prudence and judgment as ordinarily careful and prudent men would be likely to exercise under the same or similar circumstance. And if the jury believe, from the evidence, that the deceased used ordinary care and prudence to avoid accident in approaching the crossing, and that when he became aware of his danger, he used such care as men of ordinary prudence under like circumstances would be likely to use to avoid or escape injury, then his negligence did not contribute to the injury. *Ind. & St. L. Rd. Co. vs. Stout*, 53 Ind., 143; *C. & N. E. Ry. Co. vs. Miller*, 46 Mich., 532.

If the jury believe, from the evidence, that at the time of the accident in question, the plaintiff was seated in his wagon near the track of defendant's road (or as the case may be) and that the servants or agents of defendant were guilty of negligence in, etc., and that the plaintiff was thereby put in great danger of life or limb, or had reasonable ground to believe, and did believe, that he was thereby put in such danger, and that it was necessary to leap from his wagon in order to avoid

the threatened danger, and that in consequence of such belief he did jump from his wagon, and thereby caused the injury complained of, when, if he had remained in the wagon he would have sustained no injury, this alone would not deprive him of the right to recover in this suit, provided you find from the evidence, under the instruction of the court, that the defendant is otherwise guilty and the plaintiff otherwise entitled to recover. *Dyer vs. Erie Rd. Co.*, 71 N. Y., 228; *Roll vs. N. Cent. Rd. Co.*, 16 Hun, 496; *Schultz vs. Chicag', etc., Rd. Co.*, 44 Wis., 638.

§ 36. **Damage Must be the Result of the Negligence Charged.**—The court instructs the jury, that the neglect to sound the whistle or ring the bell of an engine is not of itself such negligence as will justify a recovery for damages, to person or property, injured upon the track. To entitle the plaintiff to recover for such injury, it must appear, from the evidence, that the injury was the result of such omission to ring the bell or sound the whistle. *Ind. & St. L. Rd. Co. vs. Blackman*, 63 Ill., 117.

The jury are instructed, that it is not enough to create a liability for injuries caused by a railroad train, to prove the bell was not rung, or the whistle sounded. The jury must further believe, from the facts and circumstances proved, that the accident was caused by reason of such neglect.

The jury are instructed, that although they may believe, from the evidence, that the (*cow*) in question was killed by the defendant's locomotive, and that there was a failure to ring the bell or blow the whistle, for a distance of (*eighty*) rods before reaching the crossing, still, if the jury further believe, from the evidence, that there was no connection between the failure to ring the bell, or blow the whistle, and the killing of the (*cow*), then the jury should find the defendant not guilty, unless they find, from the evidence, that the injury was occasioned by some negligence or misconduct, other than the failure to ring the bell or sound the whistle.

The jury are instructed, that whether the failure to ring the bell, or sound the whistle, on approaching the highway, by the train in question, was, or was not, the cause of the injury complained of, is a question of fact, to be determined by

the jury, from a consideration of all the evidence in the case. *Illinois Cent. Rd. Co. vs. Benton*, 69 Ill., 174.

§ 37. **Injury to Stock at Crossing.**—The jury are instructed, as a matter of law, that it would be gross negligence, in persons in charge of an engine, not to see and observe stock if they are on or near a railroad crossing, at least (*forty*) rods before reaching that point, if there was nothing in the way to prevent them seeing, if they had looked.

And in this case, if the jury believe, from the evidence, that the plaintiff's horse was injured by the defendant's engine, while the horse was on a highway crossing, and that the persons in charge of the engine could have seen the horse on the track, or in dangerous proximity to it, in season to have stopped the cars and prevented the injury, and did not see him, or seeing him, in season to have avoided the injury, did not do so, this would be gross negligence, for which the company would be liable, unless the jury believe, from the evidence, that the plaintiff was himself guilty of negligence, which contributed directly and materially to the injury. *C. B. & Q. Rd. Co. vs. Cauffman*, 38 Ill., 424; Wharton on Neg., § 397; *Parker vs. Railroad*, 34 Ia., 399.

The court instructs the jury, that in a suit against a railroad company for injuries inflicted at a highway crossing, if it appears, from the evidence, that no bell was rung, or whistle sounded, for the distance of (*eighty*) rods before reaching the crossing, and also that the company was guilty of (*other negligence*), which may have caused the injury; and if it is doubtful whether the injury was caused by the failure to ring the bell or sound the whistle, or by (*such other negligence*), or by both combined, then the company will be liable for the injury; provided, the jury believe, from the evidence, that the injury resulted from either or both of said causes, and that the plaintiff himself was free from fault or negligence.

§ 38. **Neglect to Ring the Bell, etc., Prima Facie Evidence of Negligence.**—The jury are instructed, that in a suit against a railroad company for killing stock at a road crossing, an omission, on the part of the company, to ring a bell or sound a whistle continuously for a distance of at least (*eighty*) rods

before reaching the crossing, if proved, constitutes a *prima facie* case of negligence against the company. *Illinois Cent. Rd. Co. vs. Gillis*, 68 Ill., 317.

§ 39. **Burden of Proof as to Ringing Bell.**—The court instructs the jury, that it is not for the defendant to prove that the bell was rung and kept ringing for eighty rods before the engine reached the highway crossing. It is incumbent upon the plaintiff to prove, by a preponderance of the evidence, that said bell was not rung and kept ringing for eighty rods before the engine reached said crossing. *P., D. & E. Ry. Co. vs. Foltz*, 13 Ill. App., 535.

The court instructs the jury that it is not for the defendant to show that its engineer and fireman used due care and diligence to avoid injuring the plaintiff's mare. It is incumbent upon the plaintiff to prove by a preponderance of evidence in the case, that said engineer and fireman so negligently and carelessly managed the train and engine, that said engine ran over said mare, and thereby killed her.

§ 40. **Must Exercise Reasonable Care and Watchfulness to Avoid Injuring Stock.**—If the jury believe, from the evidence, that the (cow) in question was killed by a passing train of cars on the defendant's road, and that before she was killed she was in plain view of the engine driver and fireman in charge of the engine, and that she was seen, or could have been seen, by them by the use of ordinary care and attention, in time to have slackened the speed of the train and avoided the accident, and that no efforts were made by them in that direction, this was such negligence as renders the company liable; provided, the jury find, from the evidence, that plaintiff's own negligence did not contribute to the injury.

The court instructs the jury, as a matter of law, that a railroad company is liable for stock killed upon its track, where such killing results from the want of ordinary care and caution in the running of its trains, and the plaintiff's own negligence does not materially contribute to the injury. To render the company liable in such cases, it is not necessary that the killing should be wantonly or willfully done by its servants or employes. *Rockford, R. I. & St. L. Rd. Co. vs. Rafferty*, 73 Ill., 58.

The court instructs the jury, that if they believe, from the evidence, that the persons in charge of the engine and train of cars in question, by ordinary care, skill and prudence, could have seen the animals, or that they did see them in season, so that by the use of ordinary care and skill, and without danger to the train, they might have stopped the train before striking the animals, and thus avoided the injury, and did not do so, this would be such negligence as would render the defendant liable for the injury and damage sustained by the plaintiff; provided, the jury believe, from the evidence, that the animals were injured, and that plaintiff thereby sustained damage, in manner and form as charged in the declaration; and also that plaintiff's own fault or negligence did not contribute to the injury. *T., P. & W. Rd. Co. vs. Bray*, 57 Ill., 514.

§ 41. **Speed through Cities and Villages—Limited by Ordinance.**—The jury are instructed, that when a railroad company runs its trains through a city, incorporated town or village, at a greater rate of speed than is permitted by the ordinance of the city, town or village, and stock is killed by such train while so running, the killing will be presumed to have been done through the negligence of the company. *T., P. & W. R. R. Co. vs. Deacon*, 63 Ill., 91; *Monahan vs. Keokuk, etc., Rd. Co.*, 44 Ia., 523; *Brusberg vs. Milwaukee, etc., Rd. Co.*, 50 Wis., 231.

The court instructs the jury, that it is gross negligence on the part of a railroad company to run its trains through a city, incorporated town or village, at a rate of speed prohibited by law; and if a railroad company does so run its trains, and thereby causes the death of a person, who is himself in the exercise of reasonable care and caution to avoid injury, the company will be liable. *C. & A. Rd. Co. vs. Becker*, 84 Ill., 483.

It is the duty of a railroad company, whose road runs through a city or village, to run its trains while in the city or village at such a rate of speed as to have them under control, so as to be able to avoid injury to persons or property, though there is no ordinance of such city or village on the subject; and if it fail to do so, it will be guilty of negligence. *Chi. & Alton Rd. Co. vs. Engle*, 84 Ill., 397.

The court instructs the jury, that, by the laws of this state,

if a railroad corporation, by its agents or servants, runs an engine, or train of cars, in or through the limits of any incorporated city, town or village, at a greater rate of speed than is permitted by the ordinance of such city, town or village, then the corporation is liable for all damage done to the person or property of any person injured by such engine or train of cars.

§ 42. **Speed, when not Limited by Ordinance.**—If the jury believe, from the evidence, that the (*colt*), when injured, was straying upon the depot grounds and track of the defendant, then it is not material at what rate of speed the cars were running, if within reasonable limits, and the defendant's servants were not guilty of negligence in any other respect. The defendants are not bound to run their cars with reference to the safety of stock straying upon their track. It had a right to run its trains at any rate of speed consistent with the safety of persons and property rightfully on its cars, or right of way.

§ 43. **Rules as to Children—Contributory Negligence.**—That a party seeking to recover damages caused by negligence or misconduct of another, if old enough to exercise reasonable care and caution, must show, by a preponderance of evidence, that his own negligence or misconduct did not concur with the negligence of the party charged in producing the injury complained of; and if the party injured is not old enough to exercise reasonable care and caution, then it must appear, from the evidence, that the negligence or misconduct of the persons whose care and circumspection, under the circumstances, should have been exercised, did not concur with the negligence of the party charged, in producing the injury complained of; or else, in neither case, would the complaining party be entitled to recover, unless it further appears, from the evidence, that such concurring negligence was slight, and the negligence of the party charged was gross, as explained in these instructions. *City of Chicago vs. Major*, 18 Ill. 349; *Stillson vs. H., et al., Rd. Co.*, 67 Mo., 671.

NOTE.—Upon the question, whether the contributory negligence of a parent or guardian can be imputed to a child of tender years, so as to prevent a recovery for injuries inflicted upon the child, the authorities are not agreed. See Wharton on Neg., § 310, and cases there referred to.

If the jury believe, from the evidence, that the deceased, at the time of the injury, from his age, required the care and oversight of some older person, in order to insure his personal safety, and, further, that at the time of the injury reasonable care and oversight were not exercised by the person having the charge and control of the child, and that such want of reasonable care contributed directly to the injury, then the plaintiff cannot recover, unless the jury further believe, from the evidence, that such contributory negligence was but slight, and the negligence of the defendant was gross, as explained in these instructions. *J. M. & I. Rd. Co. vs. Bowen*, 40 Ind., 545.

As pertinent to the question of reasonable care, regarding the child, the jury may consider whether it appears, from the evidence, that he was of such tender years as to need, for his personal safety, the care and oversight of some older person; and, if the jury so find, from the evidence, then they should inquire whether it appears, from the evidence, that at the time of the accident some older person was exercising such care and oversight over the person of the child, as ordinarily judicious and careful persons, having the care of children of like age, usually exercise over them. *Evansville, etc., Rd. Co. vs. Wolf*, 59 Ind., 89.

The jury are instructed, that the rule as to contributive negligence of a child, is that it is required to exercise only that degree of care which a person of that age would naturally and ordinarily use, in the same situation and under the same circumstances. *St. Louis, etc., Rd. Co., vs. Valirius*, 56 Ind., 511; *McMillan vs. Burlington, etc., Rd. Co.*, 46 Ia., 231; *Cleveland, etc., Rd. Co. vs. Manson*, 31 Ohio St., 451; *Chicago, etc., Rd. Co. vs. Murray*, 71 Ill., 601; *Baltimore etc., Rd. Co. vs. McDonnell*, 43 Md., 534; *Gov. St. Rd. Co. vs. Hanlon*, 53 Ala., 70; *Isabel vs. Hannibal, etc., Rd. Co.*, 60 Mo., 475.

Where the parents of an infant or a child, too young to be allowed on the public streets alone, are unable to give him their personal care, but do intrust him to the care and supervision of a suitable person, the negligence of the latter cannot be imputed to the parents nor to the child. *Walters vs. C., R. I. & P. Rd. Co.*, 41 Ia., 71.

The jury are instructed, that in determining the relative degrees of care, or want of care, manifested by the parties, at the time of the injury, the age and discretion of the party injured are proper subjects of inquiry for the jury. The law does not require that a child shall exercise the same degree of care and caution as a person of mature years, but only such care and caution as a person of his age and discretion would naturally and ordinarily use. *Kerr vs. Forgue*, 54 Ill., 482; *Casey vs. N. Y. C. R. R. Co.*, Abb. (N. Y.) N. Cas., 104.

If the jury believe, from the evidence, that the deceased, at the time of his death, was between (*five and six*) years of age, and that he went upon the railroad track of the defendant, and that the engineer in charge of the engine in question, through the want of ordinary and reasonable care, skill or attention, ran the engine against the deceased and killed him, in manner and form as charged in the plaintiff's declaration, then the plaintiff has a right to recover in this case; provided, the jury believe, from the evidence, that the said deceased, by reason of his tender years, was incapable of exercising any more care or discretion than he did manifest at the time of the accident.

§ 44. **Negligence as Regards Children.**—The jury are instructed, that legal negligence is the omission of such care or caution, as persons of ordinary prudence usually exercise or deem sufficient, under the circumstances of the case. And in this case, if the jury believe, from the evidence, that the child in question was injured through the negligence of the defendant, as charged in the declaration, then it will be for the jury to determine, from the evidence, whether the parents of the child were in the exercise of ordinary care and prudence, for the safety of the child, regard being had to his age and intelligence and all the surrounding circumstances. *Johnson's Adm'r, etc., vs. Chicago & N. W. R'way Co.*, 49 Wis., 529.

§ 45. **Master and Servant—Master Liable to Servant, When.**—The jury are instructed, that a master or employer is bound to use reasonable care, skill and judgment to furnish suitable machinery and implements, properly constructed, and ordinarily skillful and trustworthy agents or workmen; and if the

employer does not use such care, skill and judgment, and injury results therefrom to an employe, the employer will be liable for such injury.

While a master is not an insurer that the servants he employs are skillful and prudent, or that the workmanship or materials employed in his business are absolutely proper or suitable, yet he is bound to use all reasonable care and skill in their selection and construction, so far as regards the safety of the persons in his employ. *Shearm. & Red. on Neg.*, § 89-92; *Noyes vs. Smith*, 28 Vt., 59; *Buzzell vs. Laconia, etc., Co.*, 48 Me., 113; *McGatrick vs. Wason*, 4 Ohio St., 566; *Lewis vs. St. Louis, etc., Rd. Co.*, 59 Mo., 496; *Baxter vs. Roberts*, 44 Cal., 187; *Ackerson vs. Dennison*, 117 Mass., 407; *Strahendorf vs. Rosenthal*, 30 Wis., 674; *Richardson vs. Cooper*, 88 Ill., 270.

It is the duty of a railroad company, towards those who are in its employ, to have its road, bridges and other appurtenances, constructed of good and sound material, so far as this is reasonably practicable, having in view the business done upon the road. In their construction they should equal those of the average roads doing the same class of business, so far as relates to the safety of its employes, and the utmost care and vigilance, which is reasonably practicable, must be bestowed by the company to keep them in safe condition.

§ 46. **Duty Towards Employes.**—The jury are instructed, that it is the duty of a railway company, as employer, to use all reasonable care and foresight to provide safe structures, competent employes, and all appliances necessary to the safety of the employed, and to adopt such rules and regulations for running its trains as will avoid injury to its employes, so far as this can reasonably be done; and having adopted such rules, to use all reasonable efforts to conform to them, or the company will be responsible for consequences resulting from a departure from them. *Chicago, etc., Rd. Co. vs. Taylor*, 69 Ill., 461.

A railroad company is bound to use all reasonable precautions for the safety of its employes, and should furnish such machinery, and keep it in such condition as would be least likely to cause injuries, so far as this can reasonably be done.

It is not, however, bound to the exercise of extraordinary care, and is required to furnish such appliances only as are reasonably well calculated to insure the safety of its employes.

The jury are further instructed, that a railroad company, as regards its employes, must use all ordinary care and supervision to keep its roadway in a good and safe condition; and if its agents, charged with the duty of inspecting and repairing its track, have notice of defects in it, or by reasonable care and diligence could have learned them, and omit to make repairs, in consequence of which an employe is injured, while he is himself using reasonable care and prudence, then there is a want of such care on the part of the company as the law requires, and the company would be liable for such injuries. *Locke vs. Sioux City, etc., Rd. Co.*, 46 Ia., 109; *Lake Shore, etc., Rd. Co. vs. Fitzpatrick*, 31 Ohio St., 479.

A railroad company is bound to use all reasonable care and caution to provide suitable and safe material and skillful workmanship in the construction of its road and appurtenances, and to exercise reasonable care and watchfulness, to keep the same in good repair and safe condition, and if the company do not do so, and in consequence thereof an injury happens to one of its servants or employes, while in the exercise of reasonable care and caution himself, the company will be liable for the injury thus sustained. *Brickman vs. S. C. Rd. Co.*, 8 C. S., 173.

A railroad company must use reasonable care and caution in the selection of its rolling-stock, and in the employment of competent persons to manage its business, so that no unnecessary risk shall be incurred by any of its servants in the discharge of their duties; and if the company does not do so, and an injury happens to one of its servants, by reason of such neglect, the company will be liable for the injury thus sustained, provided the person injured is using reasonable care and caution to avoid the injury.

It is a duty the law imposes upon railroad companies that they shall do everything that reasonably can be done to furnish safe cars to its employes, to be used by them in working on the railroad, and it is not a duty that can be delegated to its officers and agents, so as to avoid liability on the part of the company.

And in this case, if the jury believe, from the evidence, that the company, through the negligence and want of reasonable care of its servants and agents, neglected and failed to furnish a safe car upon the occasion in question, but did, through negligence and want of reasonable care and caution, furnish one that was out of repair, as charged in the declaration, and that by reason of such defect the plaintiff (*or the deceased*), while using ordinary care, and in the discharge of his duty, was injured (*or killed*), then the jury should find the defendant guilty; provided, they further believe, from the evidence, that the plaintiff (*or the deceased*) did not know of such defect, and could not have known the same, by the use of reasonable care and caution on his part. *Berea S. Co. vs. Kraft*, 31 Ohio St., 287.

§ 47. **Servant Does not Take the Risk of Dangers not Incident to the Business.**—The court instructs the jury, that where a servant is injured by something not incident to his employment, but by a temporary peril, to which he is exposed by the negligent act of his employer, without any negligence on the servant's part, he is entitled to recover damages, from the employer, on account of such injury. That when a servant is employed in a business, and at a place not dangerous, and the employer negligently and carelessly creates a peril at the place where the servant is at work, and the servant is injured thereby, then the servant will be entitled to recover for such injury, if he is himself without fault contributing to such injury. Wharton on Neg., § 549; *Fairbanks vs. Haentzsche*, 73 Ill., 236; *Q. M. Co. vs. Kitts*, 42 Mich., 34.

§ 48. **Servant not Bound to Inquire, etc.**—The jury are instructed, that an employe of a railroad company, assisting in running its trains, is not bound to know or inquire whether the road has been safely and properly constructed.

There is an implied undertaking on the part of the company, with its employes, that all that can reasonably be done to render the road safe, has been done. *C. & N. W. Rd. Co. vs. Sweet*, 45 Ill., 197.

§ 49. **Negligence of the Company in Employing Servant.**—The

jury are instructed, as a matter of law, that if a servant of a railroad company, while himself using reasonable care and caution, to avoid injury, be injured through the incompetency and unskillfulness of a fellow servant, or in consequence of defects in the machinery or track, and the jury believe, from the evidence, that the company was guilty of a want of ordinary care and attention in the employment, or in the retention of such fellow servant, or in the construction or repair of its machinery or track, the company will be liable in damages, which result from such negligence, if any such damage is proved. *Haurathy vs. N. C. Rd. Co.*, 46 Mo., 280; *Harkins vs. Standard, etc.*, 122 Mass., 400; *Hunting, etc., Rd. Co. vs. Decker*, 84 Penn. St., 419.

§ 50. **Reasonable Care Only Required for Safety of Employees.**—As respects the duty of a master or employer towards a servant or employe, in his service, the court instructs the jury, as a matter of law, that the master, or employer, is not bound to provide machinery which is absolutely safe. The law imposes on the master, or employer, only the obligation to use reasonable and ordinary care, skill and diligence, in procuring and furnishing suitable and safe machinery. Wharton on Neg., § 205; *Wright vs. The N. Y. Cent. Rd. Co.*, 25 N. Y., 562; Cooley on Torts, 557; *Ladd vs. New Bedford, etc., Rd. Co.*, 119 Mass., 412; *Indianapolis, etc., Rd. Co. vs. Love*, 10 Ind., 554; *Fort Wayne, etc., vs. Gildersleeve*, 33 Mich., 137; *Camp Point, etc., Co. vs. Ballou*, 71 Ill., 417.

The court instructs the jury, that no person, or corporation, is responsible for injuries to an employe, occasioned by the carelessness, negligence or unskillfulness of a fellow servant, engaged in the same line of service; provided the employer has taken proper care and caution to engage proper servants to perform the duties assigned to them. Nor is the employer liable for injuries thus sustained, if the person injured was, while engaged as such servant, acquainted with the character of such fellow servant for capacity, prudence and skill.

The rule of law is, that when a person engages in the service of another, he undertakes, as between himself and his employer, to run all the ordinary risks incident to such service; and this includes the risk of occasional carelessness, negligence

or unskillfulness on the part of his fellow servants engaged in the same line of duty and service; provided, the employer has exercised reasonable care and caution to engage competent and careful persons to discharge the duties assigned to them. *Smith vs. Lowell Mfg. Co.*, 124 Mass., 114.

§ 51. **Employee Assumes all Ordinary Risks.**—The jury are instructed, that where a person enters into the service of a railroad company, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskillfulness, and that of his fellow servants, who are engaged in the same line of duty, provided the company has taken reasonable care and precaution to engage competent servants to discharge the duties assigned to them. *T., W. & W. Rd. Co. vs. Durkin*, 76 Ill., 395.

The jury are instructed, that a servant, when he engages in a particular employment, is presumed to do so with a knowledge of, and a taking of the risks of its ordinary hazards, whether from the carelessness of fellow servants in the same line of employment, or from latent defects in the machinery and appliances used in the business, or the ordinary dangers in the use of the same.

If the jury believe, from the evidence, that the plaintiff (*or deceased*) was engaged in the employment of the defendant when he was injured, and that such injury was received while in the discharge of his duty as such employe; and if the jury further believe, from the evidence, that such injury was occasioned either by his own negligence, carelessness or want of skill, or by that of his fellow servants, engaged in the same line of duty or service, as explained in these instructions, then the jury should find for the defendant; provided, they further believe, from the evidence, that the defendant was not guilty of any lack of care or prudence in selecting or retaining such fellow servants, to discharge the duties assigned to them.

The jury are instructed, that where an employment is attended with danger, a servant engaging in it assumes the hazard of the ordinary perils which are incident to it; and if he receives an injury from an accident, which is an ordinary peril of the service undertaken by him, he cannot recover damages for such injury. *T., W. & W. Rd. Co. vs. Black*, 88 Ill., 112.

§ 52. **Servant Having Knowledge of Defects.**—The jury are further instructed, as a matter of law, that an employe of a railroad company cannot recover from the company for an injury suffered in the course of the business about which he is employed, from defective machinery used therein, or from the dangerous condition of the track, after he has knowledge of such defect or dangerous condition, and continues his work without objection. *C. & A. Rd. Co. vs. Munroe*, 85 Ill., 25; *Fort Wayne, etc., Rd. Co. vs. Gildersleeve*, 33 Mich., 133; *Johnson vs. Western, etc., Rd. Co.*, 55 Ga., 133; *Way vs. Ill. Cent. Rd. Co.*, 40 Ia., 341; *S— vs. Ward*, 40 Mich., 420.

The jury are instructed, as a matter of law, that it is the duty of one in the employ of a railroad company, to see that the machinery which he uses is in repair, so far as this can be done by the exercise of such care and prudence as would be exercised by a prudent and careful man engaged in the same business; and when such machinery is found to be out of repair, to report the fact to the company; and if he does not do so, it is negligence on his part, and the company will not be liable for any injury sustained by him, occasioned by such machinery being out of repair. *T., W. & W. Rd. Co. vs. Eddy*, 72 Ill., 138; *Cent. Rd. Co. vs. Kenney*, 58 Ga., 485.

The jury are instructed, that if a servant discovers that machinery, used in the line of his employment, is out of order, and dangerous to himself, and he does not stop using the same, and give notice thereof to his employer, or his agents, and wait until it is put in proper condition, but continues to use it, and is injured by reason of its being in such unsafe condition, then the employer will not be liable for the injury, if he is otherwise without fault. *Richardson vs. Cooper*, 88 Ill., 270.

§ 53. **Servant Must use Reasonable Care and Caution.**—It is the duty of the servants of the company to use all reasonable care and diligence to see that the machinery used by them in the performance of their duties, is in fit condition for use, and report the defects, if any, to the company, and if they do not do so, it will be negligence on their part. *C. & N. Rd. Co. vs. Jackson*, 55 Ill., 492; *Lumley vs. Caswell*, 47 Ia., 159.

The jury are instructed, that although machinery furnished

by a railroad company, for the use of its employes, may be unsafe, yet if an employe, knowing the character of the machinery, continues to use it, he is bound to exercise care and caution, reasonably commensurate with the apparent danger, and if he fails to do so, and is injured, his negligence will preclude a recovery against the company, on account of such injury. *T., W. & W. R.R. Co. vs. Ashbury*, 84 Ill., 429.

§ 54. **Negligence of Fellow Servant.**—The jury are instructed, that the rule of law, that an action will not lie by a servant against his master or employer, for an injury sustained through the negligence or default of a fellow servant, applies only to cases where the injuries complained of occur without the fault of the employer, either in the act which caused the injury, or in the employment of the person who caused it.

While it is true that a common employer is not responsible to a servant for an injury caused by the negligence of his fellow servant, engaged in the same line of employment, yet it is the duty of the employer to use all reasonable care, caution and prudence to provide safe structures, competent employes, and all appliances necessary to the safety of the employed, and to adopt all reasonable rules and regulations to avoid injuries to the employed, and, having adopted such rules, to conform to them, or be responsible for consequences resulting from a departure therefrom. *Chicago & N. W. R.R. Co. vs. Taylor*, 69 Ill., 461.

The master does not warrant the competency of his servants to the other servants. The extent of the master's undertaking is, that he will exercise reasonable care in the selection of an employe, and if his incompetency is discovered, will dismiss him from service. The master will be liable, where the injury is imputable to his negligence, in the selection of the servant, or in retaining him after his incompetency is known. *Columbus, C. & I. Cent. R.R. Co. vs. Troesch*, 68 Ill., 545.

§ 55. **Fellow Servants Defined.**—That when the employment of a person working for a railroad company is in a different department of labor from other servants, and when he is not associated with such other servants in the performance of their

respective duties, but is wholly separated and disconnected from them, in the performance of his duties, then the railroad company is liable for the negligence of such other servant, if proven, and it results in injury to the person so employed, without his fault. *Schroeder vs. Rd. Co.*, 47 Ia., 375; *Lombard vs. Rd. Co.*, 47 Ia., 494.

If the jury believe, from the evidence, that at the time of the accident complained of, the plaintiff was in the employ of the defendant, as brakeman on one of its freight trains, and that while so employed, and in the line of his duty, he received an injury, resulting from a defective brake on one of defendant's cars, and that there were other persons in the employ of the company, whose duty it was to examine the cars and see that the brakes were in good repair and safe condition, then the court instructs the jury, as a matter of law, that the plaintiff and such other persons were not fellow servants engaged in the same grade or line of service, within the meaning of the law. *Long vs. P. Rd. Co.* 65 Mo., 225; *Nashville Rd. Co. vs. Jones*, 9 Heisk., 27.

If the jury believe, from the evidence, that at the time of the accident in question, the plaintiff was in the employ of the defendant as fireman on one of its locomotives, and that while so employed, and in the line of his duty, he received an injury, resulting from the negligence or want of ordinary care and skill of the engineer in charge of the same locomotive, then the court instructs the jury, as a matter of law, that the plaintiff and engineer were fellow servants, engaged in the same grade or line of service, within the meaning of the law, and the defendant, if otherwise without fault, would not be liable for such injury. *Valtez vs. O. & M. Rd. Co.*, 85 Ill., 500; *Lehigh Valley Co. vs. Jones*, 89 Penn. St., 432; *Besel vs. N. Y., etc., Rd. Co.*, 70 N. Y., 171; *Ragsdale vs. Memphis, etc., Rd. Co.*, 59 Tenn., 426.

If the jury believe, from the evidence, that, at the time of the accident in question, the plaintiff was in the employ of the defendant company as a brakeman on one of its trains, and that while so employed he received an injury which was occasioned by the ties on the track, at the point where the accident occurred, being rotten and unfit for use, and that the failure to replace such ties with sound ones resulted from the

negligence of the road master and section men having charge of that part of the road, and that the plaintiff was himself guilty of no negligence contributing to the injury, then the plaintiff has a right to recover. *Houston, etc., Rd. Co. vs. Dunham*, 49 Tex., 181.

Although the jury may believe, from the evidence, that at the time of the accident in question, the (*brake*) was defective and that the injury complained of resulted therefrom, still, if the jury further believe, from the evidence, that none of the officers or agents of the company knew of the defect, and that it was of such a character that it could not be discovered by the exercise of reasonable and ordinary care in that behalf, then the company would not be liable for such injury. *Central Rd. Co. vs. Kenney*, 58 Ga.

If the jury believe, from the evidence, that at the time of the accident in question the plaintiff was in the employ of the defendant corporation as a mechanic engaged in the repairs of its cars, and that, while so employed and in the line of his duty, he received an injury, resulting from the negligence or want of ordinary care and skill of an engineer, in charge of a locomotive engaged in switching cars, then the court instructs the jury, as a matter of law, that the said plaintiff and the said engineer were not fellow servants engaged in the same grade or line of service, and the plaintiff is entitled to recover in this suit, provided the jury further believe, from the evidence, that the plaintiff, at the time of the injury, was exercising reasonable care and caution to avoid such injury. *Pittsburg, etc., Rd. Co. vs. Powers*, 74 Ill., 341; *Contra: Sullivan vs. Toledo, etc., Rd. Co.*, 58 Ind., 26.

Negligence of Defendant and of Fellow Servant.—If the jury believe, from the evidence, that the defendant was guilty of negligence, as charged in the declaration, and that the plaintiff by reason thereof was injured and damaged as claimed by him, and that he himself was guilty of no want of ordinary care that contributed to the injury, then the defendant is liable in this action, although you may further believe, from the evidence, that the negligence of a fellow servant contributed to such injury. In such cases the rule of law is that contributory negligence to defeat an action must be that of the plaintiff or

of some person for whose acts he is responsible. *Shetter vs. C. & N. W. Rd. Co.*, 49 Wis., 509.

§ 56. **Duty to make Proper Rules for Safety of Servant.**—That it is the duty of a railway company to make all reasonable and proper regulations for the safety of its employes. And this being an affirmative fact, it devolves upon the company to show an observance of the duty when sued by a servant for an injury received when in its service, and negligence is shown. *Shearm. & Red. on Neg.*, § 93.

A railroad company is not liable for an injury which happens to an employe in consequence of a disregard of its plain instructions, if known to the person injured, although other employes also disregard the same instructions. *Wolsey vs. Railroad Co.*, 33 Ohio St., 227.

If the jury believe, from the evidence, that the defendant, before the injury in question, had adopted a rule for the conduct of its employes requiring them, etc., and that the plaintiff had knowledge of such rule, but neglected to avail himself of its provisions, and in consequence of such neglect sustained the injury complained of, then he cannot hold the defendant liable therefor. *Ibid.*

The defendant had the right to make such rules and regulations for the conduct of its servants and agents, while engaged in its service, as in its judgment was reasonable and proper, or would conduce to the safety and comfort of its employes; and all servants, while engaged in such service, with a knowledge of such rules and regulations, are bound to act in conformity therewith; and if injuries are sustained by them, while acting in violation thereof, no recovery can be had of the defendant therefor if such violation was the cause of, or materially contributed to, such injury. Whether, before the injury complained of, the defendant in this case had adopted a rule requiring, etc., and whether the plaintiff had knowledge of such rule, and whether he was violating such rule when he was injured, and whether, if he was so violating it, such violation contributed to the injury, are questions of fact, to be determined by the jury from the evidence. *Ibid.*

CHAPTER XXXV.

NEGOTIABLE INSTRUMENTS.

- SEC. 1. Presumption in favor of the holder.
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4. Note taken in payment or part payment, etc.
5. Assignee with notice from assignee without notice.
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7. Assignee after maturity.
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9. Assignee before maturity without notice, etc.
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§ 1. **Presumptions in Favor of the Holder.**—The court instructs the jury, that the possession of a note, indorsed in blank, unaccompanied by any declaration or other evidence in regard to it, is *prima facie* evidence that the holder is the owner of it; that he took it for value before it became due, and in the regular course of business. 1 Pars. on Notes and Bills, 255; *Pettee vs. Prout*, 3 Gray, 502; *Warren vs. Gilman*, 15 Me., 70; *Dugan vs. U. S.*, 3 Wheat., 172; *Kelly vs. Ford*, 4 Ia., 140; *Goodman vs. Simonds*, 20 How., 343; *Cook vs. Helms*, 5 Wis., 107; *Farwell vs. Myers*, 36 Ill., 510; *Stoddard vs. Burton*, 41 Ia., 582.

That the indorsee of a promissory note, in the absence of proof to the contrary, is presumed in law to have taken it in due course of trade before maturity, for value and in good faith.

When a note is indorsed without date, the presumption of law is, in the absence of proof to the contrary, that it was indorsed before it became due.

When the assignment of a promissory note is without date, the law raises a presumption that the transfer was made before the maturity of the note, and to rebut this presumption the burden of proof is upon the person alleging that the note was assigned after maturity. *Richards vs. Betzer*, 53 Ill., 466.

§ 2. **Presumption can only be Overcome by Proof.**—A person questioning the good faith of the assignment of a note in the hands of an assignee, in order to defeat a recovery, must prove, by a preponderance of evidence, that the assignment was made after the maturity of the note, or that it was not made for value, or that the transaction was for some fraudulent purpose; or that the assignee took the note with notice of the defense interposed by the defendant. 1 Pars. on N. & B., 255; *Cook vs. Helms*, 5 Wis., 107; *Depuy vs. Schuyler*, 45 Ill., 306.

The court instructs the jury, that the note introduced in evidence is sufficient *prima facie* evidence to entitle the plaintiff to recover the full amount thereof, principal and interest, according to the terms of the note, less the credits indorsed thereon.

If you believe, from the evidence, that the note in question was assigned and indorsed by the payee thereof, to the plaintiff; and if you also find that there is no evidence that it was assigned after maturity, or that the plaintiff took it with notice of the alleged defense thereto, or that it was so assigned without consideration, then the law will presume that it was indorsed to plaintiff before it was due; that he paid a valuable consideration therefor, and that he had no notice of any defense to the said note.

§ 3. **Innocent Purchaser—Taken as Security.**—The court instructs the jury, that the indorsee of a promissory note, before its maturity, taking it as security for a pre-existing debt, in the ordinary course of business and without any express agreement, is deemed a holder for a valuable consideration, and he will hold the note free from defenses on the part of the maker, of which he had no notice at the time of taking it. 1 Parsons on N. & B., 218; *Bowman vs. Millison*, 58 Ill., 36; *Carlisle vs. Wishart*, 11 Ohio, 172; *Outwrite vs. Porter*, 13 Mich., 533; *Stevens vs. Campbell*, 13 Wis., 375; *Contra: Stalker vs. McDonald*, 6 Hill, 93; *Cook vs. Helms*, 5 Wis., 107; *Grimm vs. Warner*, 45 Ia., 106.

§ 4. **Note Taken in Payment or Part Payment, etc.**—If the jury believe, from the evidence, that before the alleged transfer of the note, the said A. B. (*payee*) was indebted to the

plaintiff, and that the said note was assigned to the plaintiff by the said A. B. in (*part*) payment of such an indebtedness, then the plaintiff is what is known in law as an innocent purchaser of the note; provided, the jury further believe, from the evidence, that he took the note in good faith before it became due, and without any notice of the alleged defense thereto. *Clary vs. Sarrency*, 58 Ga., 83.

§ 5. **Assignee with Notice from an Assignee without Notice.**—The court instructs the jury, that if a note is assigned before maturity, for value, to a *bona fide* purchaser, without notice, the assignee will be protected against any defense by the maker; and a subsequent purchaser of the note from such assignee, even with notice, will succeed to his rights in the same condition he held them. A defense to the note having been once cut off by its transfer to an innocent holder, will not be revived by a subsequent assignment to a person with notice of such defense. *Woodworth vs. Huntoon*, 40 Ill., 131.

The law is, that the holder, for value, of a negotiable note, may recover on the note, though he was fully informed, when he received it, that it was obtained from the maker by fraud; provided, such holder obtains it from a person who took the note, in the usual course of business, in good faith and for value. *Riley vs. Shawacker*, 50 Ind., 592.

§ 6. **Indorsement in Blank.**—A note is said to be indorsed in blank when the indorser's name is written on the back, leaving a blank over the name for the insertion of the name of an indorsee, or person to whom it is indorsed. And when the indorsement remains in blank, the note may be passed from person to person by mere delivery, and the last holder has the right to fill in his own name as indorsee, and bring suit on the note in his own name, as though it had been indorsed directly to him in the first instance. 2 Parsons on Notes and Bills, 19, 20; *Palmer vs. Marshall*, 60 Ill., 289.

§ 7. **Assignee after Maturity.**—An assignee of a promissory note, who takes it after maturity, is supposed to have notice of any defense that exists against it; and such defense may be made as effectually against the note in the hands of such

assignee as if the suit had been brought by the original payee of the note. *Davis vs. Neleigh*, 7 Neb., 78.

§ 8. **Assignment without Consideration.**—The jury are instructed, that when a promissory note is assigned without any consideration therefor, the assignee takes it as a mere volunteer, and holds it subject to all its infirmities, the same as if he had had actual notice of them at the time of the assignment, or as if the note had been assigned to him after its maturity. 1 Parsons on Notes and Bills, 262.

§ 9. **Assignee before Maturity without Notice, etc.**—The court instructs the jury, as a matter of law, that the consideration of a negotiable note cannot be impeached in the hands of an innocent purchaser, for value, who has received it in good faith before it became due, without any notice of such defense.

§ 10. **Burden of Proof.**—If the jury believe, from the evidence, that the defendant made the note in question, then, under the issues in this case, the defendant assumes the burden of proving, by a preponderance of evidence, not only that the consideration of the note has failed in part (*or has wholly failed*), as alleged in his pleas, but also that the plaintiff took the said note after it became due, or without paying any consideration therefor, or that he had notice of the alleged failure of consideration at the time he purchased the note, if it appears, from the evidence, that he did purchase it.

§ 11. **Assignee with Notice of Suspicious Facts.**—The court instructs the jury, that where a person takes an assignment of a promissory note for a valuable consideration, before due, and is not guilty of bad faith, even though he may be guilty of gross negligence, he will hold it by a title valid against all the world, and it will not be subject to the defense of a failure of consideration in his hands. *Lafayette Sav. Bk. vs. St. Louis*, 4 Mo. App., 276.

A party who takes commercial paper, by indorsement before due, without knowledge of any defects of title or defense to it, and for a valuable consideration, will take a good title

unaffected by any defense going to the consideration. Suspicion of the defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, will not defeat his title, or let in a defense not otherwise admissible against it in his hands. That result can only be produced by bad faith on his part. *Comstock vs. Hannah*, 76 Ill., 531; *Edwd. on B. & N.*, 318; *Goodman vs. Harvey*, 4 A. & E. 870; 1 Pars. on N. & B., 258; *Goodman vs. Simonds*, 20 How., 343-363; *Farrell vs. Lovett*, 68 Me., 326.

Although the assignee of a note may have reason to know, or may actually know, when he buys it, for what the note was given, that fact alone will not make him chargeable with knowledge of special defenses to it; and in this case, although the jury may believe, from the evidence, that the plaintiff knew when he purchased the note that it was given for, etc., yet, if the jury further believe, from the evidence, that he had no notice of the special defense now set up by the defendant, and had no reason to suspect it, he will not be chargeable with notice of the same; nor can he be affected with such defense in this suit; provided, the evidence shows that the said note was assigned to him in good faith for a valuable consideration, before the maturity of the note. *Borden vs. Clark*, 26 Mich., 410.

§ 12. **Who Deemed a Bona Fide Holder.**—A holder of negotiable paper, who takes it before maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity, as between antecedent parties, is deemed a *bona fide* holder. *Crosby vs. Tanner*, 40 Ia., 136; *Twitchell vs. McMurtrie*, 77 Penn. St., 383.

In order to defeat a promissory note in the hands of a *bona fide* holder, it is not enough to show that he took it under circumstances calculated to excite suspicion. To defeat the note in his hands it must appear, by a preponderance of evidence, that he was guilty of a want of honesty, or of bad faith in acquiring it. *Johnson vs. Way*, 27 Ohio St., 374; *Shreeves vs. Allen*, 79 Ill., 553; *Hamilton vs. Marks*, 63 Mo., 167; *Moorehead vs. Gilmore*, 77 Penn. St., 118.

The jury are instructed, that a party about to take an assignment of a promissory note, is under no obligation to call upon

the maker and make inquiry as to possible defenses, which he may have, but of which the purchaser has no notice, either from something appearing on the face of the paper, or from facts communicated to him at the time. *Houry vs. Eppinger*, 34 Mich., 29; *Murray vs. Beckwith*, 81 Ill., 43.

§ 13. **Assignee with Knowledge.**—If the jury believe, from the evidence, that the plaintiff, before he purchased said note, knew, or, as an ordinarily prudent man, had reason to believe, from circumstances brought to his knowledge, before he purchased it, that the defendant had, or claimed to have, a defense to said note, or to some part of it, then the plaintiff is not an innocent holder of said note. 1 Pars. on N. & B., 258; Edwd. on B. & N., 320.

If the jury believe, from the evidence, that the plaintiff is not an innocent holder of said note, as explained in these instructions, then the defendant is entitled to set up the same defenses to it that he could have set up if suit had been brought by the payee of said note.

GUARANTOR OF COLLECTION—INDORSER OR ASSIGNOR, UNDER THE STATUTE OF ILLINOIS.

NOTE.—The liability of an indorser or assignor of a promissory note, under the statutes of Illinois, is substantially the same as that of a guarantor of collection by the law merchant, except, perhaps, that the guarantor is entitled to reasonable notice if the holder fails to collect from the maker. 2 Pars. on N. & B., 141; *Wolfe vs. Brown*, 5 Ohio St., 304; *Day vs. Elmore*, 4 Wis., 190; *Gillingham vs. Bourdman*, 29 Me., 79; *Ransom vs. Sherwood*, 26 Conn., 437; *Camden vs. Doremus*, 3 How., 515; *Green vs. Thompson*, 33 Ia., 293; *Judson vs. Gookins*, 37 Ill., 286.

§ 14. **Liability Fixed by Statute—Illinois.**—The jury are instructed, that under the laws of this State, the assignor of a promissory note is liable to pay the same to the assignee; provided, the assignee shall have used due diligence to collect the same from the maker, by the institution and prosecution of a suit against him; and if the jury believe, from the evidence, that the institution of such suit would have been unavailing to collect the note, or any part of it, from the maker, or if the maker had absconded, resided out of, or had left the state when the note became due, then the assignor would be liable

without the institution of a suit, the same as if due diligence by suit had been used against the maker. *Mason vs. Barton*, 54 Ill., 349; *Beattie vs. Browne*, 64 Ill., 360.

§ 15. **Intention does not Govern.**—The jury are instructed, that it is immaterial in this case what idea the defendant had as to his liability as the indorser of the note; such liability is fixed by law. And if the jury believe, from the evidence, that the defendant sold and indorsed the note, then he is liable, in law, as the indorser, whatever may have been his intention or understanding at the time. *Huokinson vs. Olson*, 48 Ill., 277.

§ 16. **Due Diligence Defined.**—The court instructs the jury, that in order to hold the indorser of a note liable on his indorsement, it is not necessary that the holder, in his attempts to collect the note of the maker, should have used the greatest possible degree of diligence. He is only required to use such diligence as is ordinarily used by careful, vigilant and prudent men in the conduct of their own affairs. 2 Pars. on N. & B., 141.

If the jury believe, from the evidence, that the plaintiff instituted a suit on the note in question, against the maker, in the circuit court of the county in which the maker resided, at the first term of said court after the note became due, and prosecuted said suit to final judgment, with all reasonable diligence, and, after the judgment was obtained, with all reasonable diligence caused an execution to issue thereon, and placed the same in the hands of the sheriff of said county; and if the jury further believe, from the evidence, that the sheriff at no time during the life of the execution, was able to find property of the defendant in the execution to satisfy the same, or any part thereof, and that at the expiration of (*ninety*) days from its issue he returned the execution, no property found, then the plaintiff is entitled to recover in this suit the amount of said note and interest, provided the jury further believe, from the evidence, that during the time the sheriff so held the execution, and ever since that time, said A. B. has had no property, out of which the said execution, or any part thereof, could have been made by the exercise of ordinary diligence on the part of the plaintiff. *Judson vs. Gookin*, 37 Ill., 286.

If the jury believe, from the evidence, that the plaintiff prosecuted the maker of the note by suit at the first term of court after the note was due, and recovered judgment upon it at said term, and, with all reasonable diligence, had his execution issued to the sheriff of the county where the maker of the note resided, and the sheriff returned the said execution, in whole (*or in part*) unsatisfied, and no property found, then the plaintiff is entitled to recover; provided the jury believe, from the evidence, that the defendant, in the execution, has had no property in his possession liable to be taken on said execution, as explained in these instructions, since the maturity of the said note, and before the commencement of this suit, or no such property known to the plaintiff or his attorney, or which they might have discovered, by the exercise of reasonable care and diligence directed to that end.

In order to render the assignor of a promissory note liable on his indorsement, upon the ground that the holder has used due diligence to collect the note from the maker, the assignee must show, by a preponderance of evidence, that he instituted a suit against the maker and prosecuted it to judgment, at the earliest practicable time, and that he took steps to enforce payment of the judgment, by issuing an execution thereon, and placing the same in the hands of the proper officer, as soon as this could be done by the exercise of reasonable diligence in that behalf.

Our statute, in relation to promissory notes, makes the indorser or assignor of a promissory note liable only in case the assignee has used due diligence to collect the money from the maker.

Due diligence does not consist in merely instituting a suit against the maker and prosecuting it to judgment, but, in order to show this diligence, the assignee must show, by a preponderance of evidence, that within the county where the suit was commenced he had used all the means that the law has furnished him with to enforce the collection of the money. *Holbrook vs. Vibbard*, 2 Scam., 465; *Wilson vs. Binford*, 54 Ind., 569.

§ 17. What is Due Diligence—Suit Unavailing.—That when a note is assigned by the payee, the intention of the law is,

that the assignee shall make the amount out of the maker of the note, if it can be done by reasonable diligence.

Due and reasonable diligence means such diligence as a careful, diligent and prudent man would ordinarily exercise in the conduct of his own affairs. *Judson vs. Gookins*, 37 Ill., 286.

The jury are instructed, that when the indorsee seeks to recover against the indorser of a promissory note, upon the ground that a suit against the maker would have been unavailing, the fact, if proved, that the maker was solvent when the note came due, will not affect the liability of the indorser, if it appears, from the evidence, that such solvency did not continue until a suit against the maker could have been made availing.

If the jury believe, from the evidence, that on or about, etc., the defendant sold to the plaintiff the note shown in evidence, and then and there assigned the same to him by writing his name on the back thereof, and that at the time when the note came due the said makers, and each of them, was insolvent, and have ever since remained so, and that a suit against them would have been unavailing, then the jury should find the issues for the plaintiff, and assess the damages at the amount due on said note. *McClurg vs. Fryer*, 15 Penn. St., 293; *Grilligham vs. Bordman*, 29 Me., 79; *Bull vs. Bliss*, 30 Vt., 127; *Stone vs. Rockefeller*, 29 Ohio St., 625; *Miles vs. Linnell*, 97 Mass., 298. But see *Bosman vs. Akerly*, 39 Mich., 710; *Frank vs. Marsh*, 29 Wis., 649; *Craig vs. Perkins*, 40 N. Y., 181.

§ 18. **Part of Note Collectible against Maker.**—Though the jury may believe, from the evidence, that by the use of reasonable diligence against the makers, a portion of the note could have been made out of them, but not the whole of it, then the plaintiff is entitled to recover, in this action, the residue of the debt, which could not have been made by suit, and reasonable diligence against the makers.

§ 19. **Maker Removed from the State.**—The law does not require that the assignee of a promissory note shall resort to the extraordinary process of attachment against the maker

before he can hold the indorser liable. If the jury believe, from the evidence, that before the maturity of the note in question the maker of the note had removed from this state and was residing out of this state when the note became due, then the plaintiff had a right to proceed at once against the defendant and hold him responsible for the payment of the note. *Titus vs. Seward*, 68 Ind., 456.

§ 20. **Insolvency of Maker.**—If the jury believe, from the evidence, that the plaintiff could not have collected the amount of said note, or any part of it, from the maker, by due diligence, in the institution and prosecution of a suit against him, at any time after the note became due, and before the commencement of this suit, then the plaintiff is entitled to recover.

If the jury believe, from the evidence, that the maker of the note in question, at the time the same came due, had no property except what was exempt from execution, as explained in these instructions, and that he was insolvent, and that that condition of things continued to the commencement of this suit, then the plaintiff was under no obligation to commence a suit against the maker of the note, in order to hold the defendant liable.

If the jury believe, from the evidence, that at all times, after the note came due, the institution of a suit, by the plaintiff, against the maker, would have been unavailing to collect the amount of said note, or any part of it, then the jury should find for the plaintiff.

If the jury believe, from the evidence, that at the time when the note fell due, the maker was notoriously insolvent, and has so continued up to the time of the commencement of this suit, and that the prosecution of a suit against him would have been unavailing to obtain the amount due on the note, or any part thereof, the jury should find for the plaintiff.

§ 21. **Execution Returned—No Property Found.**—The court instructs the jury, that the return, by a constable, of an execution, issued against the maker of the note, unsatisfied, or no property found, is proper evidence to be considered by the jury, with all the other evidence in the case, as tending to show that the defendant in the execution had no personal

property, subject to execution, while the execution was in the hands of the officer, nor at the time of such return.

The execution returned, no property found, by the sheriff of this county, is proper evidence to be considered by the jury, with all the other evidence in the case, as tending to show that the maker of the note had no personal or real property in this county, subject to execution, during the time the sheriff held such execution, nor at the time of said return.

§ 22. **Insolvency may be Proved by Other Evidence.**—The court further instructs the jury, that the fact that a suit against the maker would have been unavailing, may be proved by any other legal testimony, as well as by the return of an execution against him unsatisfied. To entitle the plaintiff to recover, it is only necessary for the jury to believe, from the evidence, that such suit would have been unavailing. 2 Pars. on N. & B., 142; *Roberts vs. Haskell*, 20 Ill., 59.

§ 23. **Return of the Officer not Conclusive.**—The court instructs the jury, that the executions, introduced in evidence with the returns thereon indorsed of no property found, are not alone conclusive evidence that the maker of the note was at the time insolvent, or that due diligence against him would have been unavailing. *Roberts vs. Haskell*, 20 Ill., 59.

§ 24. **Execution from Justice, no Evidence Regarding Real Estate.**—The jury are further instructed, that the return of an officer, of no property found, on an execution issued by a justice of the peace, is no evidence that the defendant in the execution did not have real estate in the county, liable to execution, at the date of such return.

§ 25. **Possession of Personal Property Evidence of Ownership.**—The court instructs the jury, that when one person sells personal property to another, and retains possession of it, the property would be subject to levy under an execution against the seller, so long as it remains in his possession, such a sale being, in law, fraudulent, as against subsequent purchasers in good faith, and execution creditors of the seller. Bump on Fraud. Com., 60.

If the jury believe, from the evidence, that A. B., the maker of the note in question, had in his possession property subject to execution, as explained in these instructions, sufficient in value to have paid the notes, at any time after a judgment might have been obtained against him, by the use of reasonable diligence, and before the commencement of this suit, then the jury should find for the defendant.

The possession of personal property is *prima facie* evidence of ownership; and in this case, if the jury believe, from the evidence, that after the maturity of the note, and after a judgment might have been obtained thereon against the maker, and before the commencement of this suit, A. B., the maker of the note, was in possession of personal property, sufficient in value to have paid the note, over and above his property exempt from execution, then it was the duty of the plaintiff to use all reasonable diligence to make the debt out of the maker of the note, by getting a judgment and levying an execution on such property, and trying the title to the same, if it was claimed by others; and if the jury believe, from the evidence, that the plaintiff did not do so, and that on this trial he has failed to overcome or remove the presumption of ownership arising from such possession, by a preponderance of evidence, then the jury should find for the defendant.

If the jury believe, from the evidence, that at, or about, the time the note in question became due, and shortly afterwards, the maker had property in his possession, not exempt from execution, as explained in these instructions, sufficient to have paid the said note, or any considerable part of it, then the presumption of law is, that such property belonged to him, and that by the use of due diligence in the institution and prosecution of a suit against the maker, the amount of the note, or a part of it, could have been made out of the maker; and the burden of proof is on the plaintiff to show, by a preponderance of the evidence, that such property did not belong to the said S. M., or that, for some reason, it was not available for the payment of said note.

To render the assignor of a note liable thereon, the holder must have used due diligence to collect it, by the institution or prosecution of a suit against the maker, unless it appears, by a preponderance of the evidence, that the institution of such suit would have been unavailing.

To excuse the holder of a note from the use of diligence to collect it of the maker, it is not sufficient to show that the maker had no visible property in his hands, or possession; it must be further proved, by a preponderance of evidence, that he apparently had no means with which to pay the note, or was so insolvent as to be unable to pay it.

The court instructs the jury, that, even though they should believe, from the evidence, that at the time the note fell due, the maker, S. M., was insolvent, still, if the jury should further believe, from the evidence, that had the plaintiff used due diligence in the collection of the note, he could have collected the same from the maker, then the jury will find for the defendant.

If the jury believe, from the evidence, that after a judgment might have been obtained against the maker of the note, and before the commencement of this suit, he had personal property, not exempt from execution, as explained in these instructions, sufficient to have paid the debt, or some considerable part of it, such state of facts raises a presumption that the note, or such part of it, could have been collected of the maker.

If the jury believe, from the evidence, that S. M., the maker of the note, was in possession of, and had under his control, personal property during, etc., such possession is presumptive evidence that he owned said property; and unless the jury believe, from the evidence, that some one else owned the property, the presumption would be that it really belonged to the said S. M. *Roberts vs. Haskell*, 20 Ill., 59.

GUARANTOR OF PAYMENT.

NOTE.—There is much diversity of opinion among the courts of the different states, as to the nature of the contract to be implied from the blank indorsement of one not a party to the bill or note, when the paper is negotiable, and the indorsement is made before its delivery to the payee. In some states, one indorsing in such manner, is *prima facie*, regarded as a guarantor; in others, as an indorser; and in others, as a joint promisor, or surety. But in most of the states, the effect of such an indorsement is held to depend upon the intention of the parties, which may be ascertained by parol evidence. 2 Pars. on N. & B., 119.

§ 26. Guarantor—Liability Generally.—The jury are in-

structed, that a guarantor of a promissory note cannot be made liable beyond the express terms of his contract or undertaking. He has a right to prescribe the terms and conditions upon which he will assume a responsibility, and no other person has a right to change those terms, not even with the design of diminishing the probabilities of ultimate loss by the guarantor; and it is wholly immaterial whether the change is advantageous to him or not. *Ryan vs. The Trustees*, 14 Ill., 20.

§ 27. **Name of Third Person on Back of Note.**—That the signature of a third party, in blank, on the back of a note in the hands of the payee, is presumptive evidence that it was placed there as a guaranty at the time of the execution of the note.

If the jury believe, from the evidence, that the defendant wrote his name on the back of the note in question before it was delivered to the payee, then the presumption of law is, that he indorsed the note as a guarantor of the payment of the same, and in such case the defendant would become liable to pay the note at maturity, if it was not then paid by the maker; unless the jury further believe, from the evidence, that it was expressly agreed and understood by the parties to the note, when the defendant indorsed it, that he did not indorse it as guarantor of the payment.

That where the name of a person, not the payee of a note, is indorsed on it, before delivery, in the absence of evidence to the contrary, he indorses it as a guarantor. *Glickauf vs. Kaufmann*, 73 Ill., 37.

§ 28. **Liable until Note is Paid.**—That the liability of the guarantor of a note continues until the note is paid or barred by the statute of limitations, and he is not discharged by a mere delay in bringing suit against the maker. *Parkhurst vs. Vail*, 73 Ill., 343.

§ 29. **Delay will not Release.**—That mere delay, on the part of a creditor, to proceed against the principal debtor, does not discharge the surety; all that the surety has a right to require is that the creditor should do no affirmative act to its preju-

dice. *Villars vs. Palmer*, 67 Ill., 204; Edwd. on B. & N., 292; 2 Pars. on N. & B., 246.

§ 30. **Consideration for Guaranty.**—The jury are instructed, as a matter of law, that to render a contract of guaranty binding, it must be upon a good or valuable consideration. If a guaranty is placed upon the back of a note, at the time of its execution or before its delivery to the payee, so as to form a part of the original transaction, then no other consideration need be shown.

But when the name of a guarantor is written on the back of a note, after its delivery to the payee, then, to make the guarantor liable, the jury must believe, from the evidence, that there was some new consideration for such guaranty. *Joslyn vs. Collinson*, 26 Ill., 61; 2 Pars. on N. & B., 126; *Ware vs. Adams*, 24 Me., 177; *White vs. White*, 30 Vt., 338.

If a third party signs his name, as a guarantor, upon a promissory note, before its delivery to the payee, the consideration of the note will be presumed to be the consideration of the guaranty; but if he signs it after delivery to the payee, then a consideration must be shown.

If the jury believe, from the evidence, that the defendant signed his name on the back of the note in question at the time it was made, and before, or at the time, it was delivered to the payee, then the defendant would be bound by his contract of guaranty, without any consideration therefor, other than the consideration of the note, provided the jury believe, from the evidence, that the defendant signed the note in the capacity of guarantor.

§ 31. **Release of Guarantor or Surety—Alteration of Note.**—The law is that, if a promissory note is signed by a party, as surety or guarantor, while blank as to (time and place of payment) and in this condition is intrusted to the principal to deliver to the payee, and the principal fills up these blanks differently from what had been agreed upon, then the surety or guarantor makes the principal his agent for filling such blanks, and he will be bound by the note as thus filled up. *Gottrupt vs. Williamson*, 61 Ind., 599.

The law is, that if a party to a negotiable instrument,

intrust it to the custody of another with blanks not filled up, whether it be for the accommodation of the person to whom it is intrusted, or to be used for his own benefit, the instrument carries on its face an implied authority to fill up the blanks and perfect the instrument. As between such party and an innocent third party, the person to whom the note was intrusted, must be deemed to be the agent of the party who committed the instrument to his custody. *Bank of P. vs. Neal*, 22 How., 96.

If the jury believe, from the evidence, that the name of C. H. was placed on the note in suit after the execution of the guaranty, then the burden of proving, by a preponderance of evidence, that said name was placed upon said note with the knowledge and consent of the defendant, is upon the plaintiff, and if the evidence, upon this point, is equally balanced, the jury must find for the defendant.

Whether the adding of the name of C. H. to the note, after the execution of the guaranty, was a benefit or an injury to the guarantor, is not a subject of inquiry for the jury—the only question for them is, was it done after the guaranty was written, and, if yes, was it done with or without the consent of the defendant; and if the jury believe, from the evidence, that it was so done, without his consent, this would render his guaranty void, although such signing may have been a benefit to the defendant.

§ 32. **Release of Guarantor—Extending Time.**—The court instructs the jury, that a valid agreement between the payee or holder and the principal maker of a promissory note, for an extension of the time of payment of the note for a definite and fixed period of time, after its maturity, will release the guarantor (*or surety*), unless he consents to the agreement at the time it is made, or afterwards ratifies it: *Edwd. on B. & N.*, 291; 2 Pars. on N. & B., 245; *Danforth vs. Simple*, 73 Ill., 170; *Tracey vs. Quillon et al.*, 65 Ind., 249; *Barron vs. Cady*, 40 Mich., 259; *Kittle vs. Wilson*, 7 Neb., 76.

If you believe, from the evidence in this case, that the defendant executed the guaranty on the note before its delivery to the payee, and if you further believe, that at the time he so executed the said guaranty, it was understood and agreed

by him, that the name of C. H. should be added to the note as one of the makers thereof before the delivery of the same, and if you further believe, from the evidence, that the name of C. H. was so added, in pursuance of said agreement, and understanding of the defendant, then the defendant is liable upon the guaranty, and you should find for the plaintiff, and assess his damages at such sum, as you believe, from the evidence, is due upon the note.

An agreement to extend the time of payment of a note, after its maturity, made between the holder and the principal maker, to have the effect to release the indorser, must be a valid agreement, upon a sufficient consideration, and one that the maker could enforce as against the payee or holder of the note. An agreement to continue to pay usury (*or an agreement to continue to pay interest at the rate mentioned in the note*) would not be such an agreement, and it would not release the indorser. *Stewart vs. Parker*, 55 Ga., 656; *White vs. Whitney*, 51 Ind., 124; *Myers vs. First Nat. Bk.*, 78 Ill., 257; *Weed & Co. vs. Oberreich*, 38 Wis., 325; *Fawcett vs. Freshwater*, 31 Ohio St., 637.

A contract to extend the time of payment on a note, in consideration of money actually paid, is a binding contract, and releases the surety on the note, if made without his knowledge or consent, whether the money so paid be regarded as usury or not.

The contract of a surety is construed strictly in his favor; and he cannot be held responsible, beyond the precise terms of his contract; and any binding contract by which the holder of a note agrees to give additional time to the maker, without the assent of the guarantor, will release him, and this whether the contract is made before or after the maturity of the note.

In this case the defendant A. B. is sued as an indorser or guarantor of the note in question, and if the jury believe, from the evidence, that at or about the time the note became due, the plaintiff, without the knowledge or consent of the defendant, made an agreement with the maker of the said note, to extend the time of payment of the same for the period of, etc., provided the maker of the said note would pay interest thereon in advance for such extension, at the rate of, etc., and that, in pursuance of such agreement, such advance interest

was then and there paid, then such agreement to extend the time of payment of said note would release the defendant from all liability thereon. *Randolph vs. Fleming*, 59 Ga., 776.

If the jury believe, from the evidence, that the defendant A. B. signed the note in question merely as surety and for the accommodation of the other makers of said note, and that this fact was known to the plaintiff when the note was given, and that at or about the time that the note came due, the plaintiff, without the knowledge or consent of said A. B., made an agreement with the other makers of said note to extend the time of payment of the same for the period of (sixty days), in consideration that such other makers of said note would pay interest thereon, in advance, for such extension, at the rate of, etc., and that in pursuance of such agreement such advance interest was then and there paid, then such agreement to extend the time of payment of said note would release the defendant A. B. from all liability thereon. *Fawcett vs. Freshwater*, 31 Ohio St., 637; *Winne vs. Colorado Springs Co.*, 3 Col., 155.

§ 33. **Subsequent Promise to Pay.**—The court instructs the jury, as a matter of law, that a promise, by the indorser of a note, to pay it, made after the maturity of the note, and with the knowledge, on the part of the promisor, of all the material facts relating to the non-payment of the note by the maker, amounts to a waiver of proof of the insolvency of the maker, and of the necessity of using diligence to collect the same by the institution and prosecution of a suit against him. And, in this case, if the jury believe, from the evidence, that since the note became due, the defendant, with full knowledge of all the facts relating to the liability and responsibility of the maker, promised the plaintiff to pay the note, then the jury should find for the plaintiff, regardless of the insolvency of the maker. 1 Pars. on N. & B., 584; Edwd. on B. & N., 650; *Tobbetts vs. Dowd*, 23 Wend., 379; *Hughes vs. Bowen*, 15 Ia., 446.

That the rule of law is, that when the holder of a promissory note is guilty of such laches as will release an indorser, and the indorser afterwards promises to pay the note, with full knowl-

edge of the facts, which would operate to discharge him, then the indorser will still be liable upon his indorsement. Whether the indorser, in such case, knows or does not know that he is released from liability, as a matter of law, makes no difference; it is enough if he knows the facts, and makes the promise. *Edwd. on B. & N.*, 651; *Tebbetts vs. Dowd*, 23 Wend., 379.

If the jury believe, from the evidence, that since the note sued on became due, the defendant, with full knowledge of all the facts relating to the non-payment of the note by the maker, has promised to pay it, then the law presumes that the maker of the note was insolvent at the time the note became due, and that a suit against him would have been unavailing.

If the jury believe, from the evidence, that the maker of the note was solvent at and since its maturity, and that the defendant was released from his liability thereon as indorser, by the failure of the plaintiff to sue the maker, still, if the jury believe, from the evidence, that the defendant, with full knowledge of all these facts, afterwards promised to pay it, then his antecedent liability therefor is, in law, a sufficient consideration to support his promise to pay the same.

When the principal maker and the holder of the note agree, for a valuable consideration, to extend the time of payment of the note, without the knowledge or consent of the surety or guarantor, such an agreement will release the surety or guarantor; but if the surety subsequently promises to pay the note, with knowledge, at the time, of such previous extension, this will be a waiver of any defense which he might have had by reason of the extension.

INDORSER.

§ 34. **Demand of Payment and Notice.**—The jury are instructed, that in order to hold an indorser of a promissory note upon his indorsement, the law requires the holder to present the note to the maker for payment, and if payment is refused, to immediately notify the indorser. Whether in this case the plaintiff did, etc., present the said note for payment and immediately give notice of non-payment to the indorser, are questions of fact to be determined by the jury.

As a matter of law, if the holder of negotiable paper neg-

lects to have it protested for non-payment by the maker, he thereby makes the paper his own and releases the indorser; and it makes no difference whether the maker was insolvent at the time the note came due, or that the indorser will sustain no injury from want of notice of non-payment by the maker. *Whitten vs. Wright*, 34 Mich., 92.

Demand of payment from the maker and notice of non-payment of a promissory note may be waived by the indorser by any act of his calculated to put the holder off his guard and prevent him from treating the note as he otherwise would have done in regard to such demand and notice, and in this case, if the jury believe, from the evidence, that shortly before or about the time the note came due, plaintiff saw the defendant and spoke to him in reference to the payment of the note, and that defendant then stated (it's all right, I indorsed the note expecting to pay it when due, and will call in and see about it), this would amount to a waiver of a demand on the maker for payment and of notice to the defendant of non-payment. *Edward on P. Notes*, 633; *Love vs. Vining*, 7 Met., 212; *Hale vs. Danforth*, 46 Wis., 554.

Any conduct on the part of an indorser, towards the holder of negotiable paper, calculated to put a person of reasonable prudence off his guard and to induce him to omit demand of payment from the maker or to give notice of the dishonor of the paper, will dispense with the necessity for taking these steps. And in this case, if the jury believe, from the evidence, that the defendant shortly before, and about the time the note became due (requested the plaintiff not to protest the note) or (that he said to the plaintiff that arrangement for the payment of the note was about being made, and to hold on, etc.), this would amount to a waiver of demand on the maker, for the payment of the note and of notice of non-payment. *Boyd vs. Bank*, 32 Ohio St., 526; 1 Pars. on N. & Bills, 582-592; 2 Daniel's Neg. Inst., Sec 1103.

§ 35. Failure or Want of Consideration—Burden of Proof.—The court instructs the jury, that under the laws of this state, the note offered in evidence in this suit is *prima facie* evidence of an honest indebtedness owing from the maker to the payee of the note, at the time it was made and delivered; and, unless

the defendant has established, by a preponderance of evidence, that the note was given without consideration (or that the consideration has failed), in whole or in part, or that since it was made and delivered, the note, or some part thereof, has been paid, then the jury should allow the plaintiff in this suit the amount of said note, principal and interest.

That when, in a suit upon a note, the defendant sets up a failure of the consideration of the note, either in whole or in part, as a defense to the action, he must establish such failure, by a preponderance of the evidence; and, in this suit, if the jury find that the defendant has not proved the failure of the consideration, as alleged in his pleas, by a preponderance of the evidence, the jury should find for the plaintiff for the face of the note and interest.

That the production of the note in evidence entitles the plaintiff, *prima facie*, to recover the amount which appears to be due by the face of the note, after deducting the payments, if any, that have been made thereon; and the burden of proving any defense to said note is upon the defendant, and unless he has proved his alleged defense, by a preponderance of evidence, the jury should disregard such defense in arriving at their verdict.

§ 36. **Consideration Presumed, When.**—The court instructs the jury, that it is not necessary, in the first instance, for the plaintiff to show any consideration for the giving of said note; the note itself imports consideration, and is sufficient to entitle the plaintiff to recover, unless the jury believe, from the evidence, that the defendant has shown some good and valid defense to the same, and the burden of proof is on him to show such defense.

The jury are further instructed, that the law implies that every promissory note that is made and delivered, was given for a good and valuable consideration; and, in this case, the burden is upon the defendant to prove, by a preponderance of the evidence, that the note in question was given without consideration, and unless he has done this, the jury should find for the plaintiff.

§ 37. **Abandonment of Claim a Good Consideration.**—If the

jury believe, from the evidence, that at the time the note was given, the payee of the note, in good faith, claimed to have a lien upon said lands, for the payment of a debt due him, or some right or interest in or to the land, and that the note was given in consideration of his giving up and abandoning such claim, and that he did thereupon give up and abandon said claim, that would be a sufficient consideration for the note, and it would not matter, in such case, whether his claim was a valid one in law or not. 1 Chitty on Con., 29; *Hindert vs. Schneider*, 4 Ill. App., 203.

§ 38. **Disputed Claims must be Sustainable.**—The jury are instructed, that to render the forbearance of a claim, or an agreement not to enforce an alleged claim, a sufficient consideration for a promissory note, it is essential that the claim itself, if well founded, be sustainable, either at law or in equity, in favor of the person for whose benefit the note is given; and the court instructs the jury that a claim based upon the settlement of a criminal charge cannot be sustained, either at law or in equity, and if the jury believe, from the evidence, that the note in question was given in settlement of a criminal charge, then it is without consideration. *Heaps vs. Dunham*, 95 Ill., 583; *Parsons vs. Pendleton, etc.*, 59 Ind., 36; *Tucker vs. Rank*, 42 Ia., 80; *O. & C. Rd. Co. vs. Potter*, 5 Oreg., 228.

§ 39. **Want of Consideration.**—The court instructs the jury, that the want of a consideration destroys the validity of a note in the hands of the payee, or in the hands of any one chargeable with notice of a want of consideration, and this without regard to the good faith of the transaction in which the note was given; and, in this case, if the jury believe, from the evidence, that the note was given without any good or valuable consideration, they should find for the defendant; provided, that the jury further believe, from the evidence, that the note was assigned to the plaintiff after its maturity, or that he had notice of such want of consideration when it was assigned to him.

If the jury believe, from the evidence, that the note in question was given without a good or valuable consideration, then,

although the jury may further believe, from the evidence, that the plaintiff has promised to pay the note since it was made and delivered, such a promise would not be binding on the defendant, unless it was made upon some new and valuable consideration; unless the jury further believe, from the evidence, that the note was assigned to the plaintiff before its maturity, and that he had no notice of such want of consideration when he purchased the note.

§ 40. **Note Obtained by Fraudulent Representation.**—As regards the defense set up in this case, that the note was obtained by false and fraudulent representations, the court instructs the jury, that to defeat a recovery on that ground, the jury must believe, from the evidence, that the alleged representations were made, as charged; that they were false when they were made; that the said A. B. then knew them to be false; that they were such as a man of ordinary caution and prudence would be likely to rely upon; that the said defendant did rely upon the truth of them, and was induced thereby to give the note in question, and that he has been, in some manner, injured by such representations.

§ 41. **Representations must be Material.**—If the jury believe, from the evidence, that the defendant got for his note all that he expected to get, so far as relates to quantity and value, in the transaction in which the note was given, then he is liable upon the note, although the said A. B. may have deceived him in relation to his own interest in the property, or in any other matter not affecting the value of the property or of the consideration of the note.

§ 42. **Obtained by Fraud and Circumvention.**—If the jury believe, from the evidence, that the defendant was induced by the plaintiff, or by any one acting for him, to sign the note offered in evidence in this case, by fraud or circumvention, in manner and form as alleged in defendant's plea, then the said note is void as to the defendant, and he is not liable thereon.

If the jury believe, from the evidence, that the said A. B. was the agent for the plaintiff, and that he obtained said note from the defendant as such agent, and further, that when de-

fendant signed the note he was unable to read writing readily, and requested the said A. B. to read the same to him (*or the said A. B. offered to read the same to him*), and did read it to the defendant, and if the jury further believe, from the evidence, that the said A. B., when reading said note, misread the same in any material part, and thus misled the defendant, and induced him to sign said note, when he would not otherwise have done so, then these facts would constitute fraud and circumvention, within the meaning of the law, and the note is not binding upon the defendant, but is wholly void as to him. Edwd. on B. & N., 325; Chitty on Bills, 73.

The jury are instructed, that the question for their determination in this case is not whether the note was given for (*a patent right*), but the real question is, was there any trick, artifice or fraud practiced upon the defendant to procure his signature. And unless the defendant has shown, by a predomance of evidence, on this trial, that his signature was obtained to said note by some trick, artifice or fraud, so that he signed the same without knowing that he was signing a note, then the jury should find for the plaintiff upon that issue.

The defense set up by the defendant in this case is, that he did not make the note, and also that his signature thereto was obtained by fraud and circumvention. As regards the latter of these defenses, the jury are instructed that it is wholly immaterial what the note was given for, or what deception was practiced on him in relation to the consideration of the note; provided the jury believe, from the evidence, that the defendant did sign the note in fact, and know that he was signing the note when he did so.

§ 43. **Fraud and Circumvention, Void by.**—The court instructs the jury, that, by the laws of this state, if any fraud or circumvention be used in obtaining the making or execution of a promissory note, such note will be absolutely void as against the maker, whether in the hands of the party committing the fraud, or in the hands of any assignee of the instrument.

The court instructs the jury, that in a suit by the assignee of a promissory note, the fact, if proved, that the execution of the note was procured by fraud or circumvention, is a good defense, and it is immaterial whether the assignee took the

note with or without notice of such defense; provided, the maker used reasonable care and caution to avoid being imposed upon. *Hewitt vs. Jones*, 72 Ill., 218.

That if a person is induced, through a fraud practiced upon him, to sign a promissory note, under the belief that it is an instrument of an entirely different character, and he is guilty of no negligence on his part, the note will be void in whosoever hands it may be, as having been obtained through fraud and circumvention. *Hubbard vs. Rankin*, 71 Ill., 129. See *Van Brunt vs. Langley*, 85 Ill., 281.

In this state, if the signature of a person is obtained to a note by the fraud or circumvention of the payee thereof, or of any person acting for him, then such a note will be wholly void, even in the hands of a *bona fide* assignee without notice; provided, it appears, from the evidence, that the maker of the note was not chargeable with any want of reasonable care and caution to avoid being imposed upon. *Griffiths vs. Kellogg*, 39 Wis., 290.

If the jury believe, from the evidence, that the defendant was induced to execute the note in question by false and fraudulent representations made to him, regarding the character of the instrument which he was desired to sign, so that he was led to believe the paper presented was a wholly different instrument, then the note is void as to him, and the plaintiff cannot recover thereon; provided, the jury further believe, from the evidence, that the defendant was not chargeable with any negligence which contributed to the deception. *DeCamp vs. Hamma*, 29 Ohio St., 467; *Hubbard vs. Rankin*, 71 Ill., 129; *Gibbs vs. Linaburg*, 22 Mich., 479.

§ 44. **Fraud in the Consideration not Sufficient.**—The court instructs the jury, that fraud and circumvention, in obtaining the execution of a note, within the meaning of the statute, is not a fraud which relates to the quality, quantity, value or character of the consideration of the note. It means some trick, artifice or device, by means of which a person is induced to give the note in question, under the belief that he is giving an instrument of a different character; as when a person is induced to give a note under the belief that it is a receipt (or is induced to give a note for one amount, under the belief that

it is for a different amount). *Latham vs. Smith*, 45 Ill., 25; *Butler vs. Carns*, 37 Wis., 61.

To render a promissory note void in the hands of a *bona fide* assignee, on the ground of fraud and circumvention, the fraud must relate to the execution of the note itself, and not to the consideration. The fraud must relate to the nature and character of the instrument, or to the amount or other terms of the note, in order to come within the terms, fraud and circumvention, in procuring the execution of the instrument.

The jury are further instructed, that in this suit (*or under the plea of fraud and circumvention, etc.*), the jury have nothing whatever to do with the question, whether the machine received by the defendant was worth much or little, or whether he was deceived and defrauded in the consideration of the note. So far as the question of (*fraud, etc.*) is concerned, the only question for the jury to consider is, whether the defendant's signature to the note was obtained by fraud and circumvention—that is, by some fraudulent trick or device.

§ 45. **Signing without Reading.**—If the jury believe, from the evidence, that the defendant did sign the note, and further, that he was induced, by the representations of the said A. B. regarding the contents of the paper thus signed by him, not to read it over, and if the jury further believe, from the evidence, that in relying upon such representations, the defendant acted as the great mass of men, in his station in life and engaged in the same business, would have acted, and that in that regard he used ordinary and reasonable care and caution to avoid being imposed upon, then the plaintiff, as regards the question of fraud, stands in precisely the same position as the original payee would have stood, if suit had been brought in his name.

Though the jury may believe, from the evidence, that the person who took the note in question, practiced a fraud upon the defendant, to induce him to give the note, still, if the defendant signed the same, knowing that he was giving such a note as the one in controversy, this is not what the law means by obtaining the execution of a note by fraud or circumvention.

§ 46. **Mistake as to Legal Effect.**—If the jury believe, from

the evidence, that the defendant, at the time he signed the note in question, was mistaken as to its legal effect, still, if the jury further believe, from the evidence, that he did sign the note, that he read the note over, and knew its contents at the time he signed it, then the mistake, on his part, as to the legal effect of the note, cannot affect the plaintiff's right to recover in this suit.

§ 47. **Reasonable Care, What.**—The jury are instructed, that when a person executes a note, he must be diligent and use all reasonable means to prevent a fraud being practiced on him, and if he does not do so, he will be liable to an innocent purchaser of the note, before maturity. He is not required to use every possible precaution, but only such as would be expected from men of ordinary prudence, in the same station of life and of the same general business experience.

In order to make the defense of fraud and circumvention, in obtaining the execution of a note, available against an innocent assignee thereof, before maturity, it is only necessary to show that the maker of the note used ordinary care and caution to prevent being imposed upon, in the execution of the note, and that the execution of the same was obtained by fraud and circumvention.

In order to make the defense of fraud and circumvention, in obtaining the execution of a note, available against such note, in the hands of an innocent assignee, before maturity, it is not necessary that the maker should use the highest degree of care and caution, to avoid being imposed upon; it is only necessary to use such reasonable caution as generally governs the conduct of a majority of prudent men.

§ 48. **Must Use Reasonable Care to Avoid Imposition.**—That a person, before executing a promissory note, should use all reasonable and ordinary precautions to avoid impositions, and if able to read writing readily, he should examine it himself, and if not able to read, he should have it read to him, by some one in whom he has confidence, unless some trick or artifice is used, or false statement made, reasonably calculated to induce him to neglect such ordinary prudence. *Ross vs. Doland*, 29 Ohio St., 473; *Nebecker vs. Cutsinger*, 48 Ind., 436.

Where one voluntarily signs a negotiable promissory note, supposing it to be an obligation of a different character, but has full means of information in the premises and neglects to avail himself thereof, relying upon the representations of another, he cannot set up such ignorance and mistake against an innocent holder for value, who takes it before maturity. If, however, his signature was procured through artifice or fraudulent representations, without negligence on his part (under such circumstances that reasonable and ordinary care would not enable him to discover the fraud or imposition), then the maker is not liable on the note. *DeCamp vs. Hamma*, 29 Ohio St., 467; *Mead vs. Munson*, 60 Ill., 49; *State Bank vs. McCoy*, 69 Penn. St., 204; *Douglas vs. Matting*, 29 Ia., 498.

Although the jury may believe, from the evidence, that a person representing himself as the agent of A. B., the payee named in the note in suit, applied to the defendant to become an agent of the said A. B. for the sale of (seed drills), to be manufactured by the said A. B., and that it was agreed between said agent and the defendant (that defendant should only be required to pay an agreed share of the money collected by him from such sales, etc.), and that the defendant signed the note offered in evidence, supposing, at the time, that he was only signing certain papers constituting himself such agent, in pursuance of such agreement, and that he was deceived as to the character of such paper by the false and fraudulent representations of said agent in reference thereto, still the defendant will be liable upon said note, provided you further believe, from the evidence, that the defendant was able to read writing, and did not read the paper, or without unreasonable efforts in that behalf might have learned the true character of the paper, by procuring the same to be read to him by some person having no interest in deceiving him; and also that the plaintiff took the note in the ordinary course of business, for value and before due, and without any notice of the fraud practiced upon the defendant. *Ross vs. Dolan*, 29 Ohio St., 473.

§ 49. **Burden of Proof.**—That the allegation that his signature was obtained by fraud and circumvention, is one upon which the defendant has the burden of proof; and before he can

derive any benefit from that allegation, he must prove the truth of it, by a preponderance of evidence; and unless he has done so, the jury should find for the plaintiff, upon that issue.

The jury are further instructed, that when a person sets up fraud and circumvention, to defeat a recovery on a note, and supports such defense by his own testimony alone, and the other party to the transaction, by his testimony, denies the statements of the defendant, in respect to such fraud, and both parties are equally credible, have equal opportunities for knowing, and testify apparently with equal fairness, candor and truthfulness, and neither is corroborated by other evidence, or by other facts or circumstances shown on the trial, then the defense of fraud is not proven.

The court instructs the jury, that if they believe, from the evidence, that the defendant signed his name to the note, introduced in evidence, then the note will entitle the plaintiff to recover, unless the defendant has established, by a preponderance of evidence, that the signature to the note was obtained by fraud or circumvention.

Although the jury may find, from the evidence, that there was an agreement between the agent of the said A. B. and the defendant, to the purport and effect of the agreement set out in the last instruction, and that the defendant, by the false and fraudulent representations of the said agent, was induced to affix his signature to a printed blank which would be in the form of a promissory note when the blanks were filled, but without any intention of executing a promissory note, and then delivered the said paper so signed by him to said agent, and gave him no authority to fill said blanks or to write anything over his signature, still the defendant would be liable in this case, if you further believe, from the evidence, that the agent, or the said A. B., afterwards filled the blanks in the form in which it is now written, and that the plaintiff took the note in the ordinary course of business for value and before due, without any notice of the fraud practiced upon defendant. *Ross vs. Doland*, 29 Ohio St., 473.

§ 50. **Fraud May be Waived.**—If the jury believe, from the evidence, that after the giving of the note in question the

defendant learned all the facts regarding, etc., and that after discovering such facts, and at or about the time the note came due, he requested the plaintiff to give him time to pay it, stating that he would pay it, and that the plaintiff, in pursuance of such request, did give him additional time after the note came due in which to pay it, then the defendant thereby waived the alleged fraud, and he will now be liable on the note, although at the time he asked for time to pay it he did not know that the facts, now set up as a defense, would make a defense in law. *Rindskopf vs. Doman et al.*, 28 Ohio St., 516.

§ 51. **Note Stolen, or Wrongfully Obtained.**—If the jury believe, from the evidence, that the defendant signed the note in question, in this case, knowing that it was a note, and they also believe, from the evidence, that the note was assigned to the plaintiff, for a valuable consideration, before the maturity of the note, in the regular course of business, and that the plaintiff, at the time of such assignment, had no notice that the note was not properly put into circulation, then the plaintiff will have a right to recover, even though the jury may further believe that the note was obtained from the maker by fraud (*or that it was stolen from, etc.*) or otherwise wrongfully put into circulation. *Clark vs. Johnson*, 54 Ill., 296; *Barsen vs. Huntington*, 21 Mich., 415.

That, although the jury may believe, from the evidence, that the note in question was lost by the defendant (*or stolen from him*), or otherwise wrongfully put into circulation, still, if the jury further believe, from the evidence, that the plaintiff took the same, in the regular course of business, in good faith, for a valuable consideration, and before maturity, and without any knowledge of the manner in which it got into circulation, then the plaintiff is entitled to recover on the note. *Franklin, etc., vs. Heinsman*, 1 Mo. App., 336; *Shiply vs. Carroll*, 45 Ill., 285; *Murry vs. Lardner*, 2 Wall., 110; *Gavanagan vs. Bryant*, 83 Ill., 376.

The court instructs the jury, that in order to defeat the title of the purchaser, for value, before maturity, of stolen negotiable promissory notes, the circumstances proved must be such as to lead the jury to believe, from the evidence, that the pur-

chase was made in bad faith, or with notice of the want of title in the seller; mere proof of negligence or want of caution on the part of such a purchaser, is not alone sufficient to defeat his title or right to recovery. *Duchess Co. Mutual Ins. Co. vs. Hachfield*, 73 N. Y., 226.

§ 52. **Duress—Abuse of Criminal Process.**—The court instructs the jury, that if they believe, from the evidence, that the note sued upon, in this case, was obtained from the defendant through a wrongful perversion or abuse of criminal process, as explained in these instructions, then such note is void in the hands of the payee, or in the hands of any person taking it after maturity, or with notice of the manner in which it was obtained. *Bowen vs. Buck*, 28 Vt., 309; *Fay vs. Oatley*, 6 Wis., 42; *Cappell vs. Hall*, 7 Wal., 538; *Schenk vs. Phelps, et al.*, 6 Brad. (Ill.), 612.

If the jury believe, from the evidence, that L., the payee of the note, caused criminal process to be issued against the defendant, and used it to enforce a settlement of a doubtful claim, and that while defendant was under arrest, under such process, the said L. used threats against the defendant, to induce him to sign the note in controversy, and that such threats were of such a character, and made under such circumstances, as to be likely to terrify a man of ordinary and reasonable firmness, and that under the influence of such threats, and while under such arrest, the defendant signed the notes, then the law is that such note is void, etc.

If the jury believe, from the evidence, that one of the plaintiffs swore out a warrant for the arrest of the said A. B., upon a charge of (procuring goods of the plaintiffs by false pretenses) and caused the said A. B. to be arrested upon said warrant and taken to, etc., for the purpose of getting the note out of the defendant or otherwise securing an indebtedness due to them, and that they did by this means procure the note in question, and then turned the said A. B. loose without attempting further to prosecute him upon the criminal charge, then this was an unwarranted use of criminal process of the state, and the plaintiffs cannot recover upon a note so procured, even if the said (A. B.) had been guilty of procuring goods of them by false pretenses.

The jury are further instructed, that whether or not the said A. B. owed the plaintiff for goods, or whether or not he was guilty of (obtaining goods from them by false pretenses) are questions not involved in this suit (so far as regards the right to recover on the note). The only question for the jury to pass upon in connection with the criminal case, is whether the plaintiff used the criminal process of the state, not with the intention, in good faith, of prosecuting the criminal, but for the purpose of securing a private debt, and if the jury believe, from the evidence, that it was used for the latter purpose, and that the note was obtained by means of such arrest, then the note is void, and it cannot be enforced in their hands.

NOTE.—If suit is brought by an assignee of the note, qualify these instructions to meet that state of the case.

The court instructs the jury, that free consent is of the essence of every contract, and if there be compulsion there is no consent; and moral compulsion, such as that produced by threats to inflict great bodily harm, as well as that produced by unlawful imprisonment, is regarded, in law, as sufficient to destroy free agency.

Threats made by a party having a warrant for an arrest, and threats to execute it, or threats to continue a prosecution after an arrest under the warrant, unless the demands of the person making the threats are complied with, are sufficient to avoid a contract entered into through fear induced by such threats; provided, the claim is of doubtful validity, or is disputed by the party threatened.

It is against public policy that criminal process should be used for the purpose of effecting the settlement of a doubtful claim; and, in this case, if the jury believe, from the evidence, that the plaintiff obtained and used a warrant for the arrest of the defendant, for the purpose of effecting a settlement of a doubtful claim against him, and thereby obtained the notes in question, then such notes are void.

If the jury believe, from the evidence, that the execution of the notes sued upon was obtained by means of threats against the defendant, as stated in such defendant's plea, and that such threats were of such a character as to be likely to terrify a man of ordinary and reasonable firmness, then

duress would be established, and the notes thus obtained are void.

§ 53. **Lawful Imprisonment not Duress.**—The jury are instructed, that a lawful imprisonment is not such duress as will, alone, enable a party to avoid a note made, while so imprisoned, on the ground of duress.

And, in this case, although the jury may believe, from the evidence, that the notes in question were executed and delivered while the defendant was under arrest, still, if the jury further believe, from the evidence and under the instructions of the court, that such arrest was legal, then such arrest alone will not render the said notes void. *Heaps vs. Dunham et al.*, 95 Ill., 583.

The court further instructs the jury, that there is no evidence in this case authorizing the arrest of the defendant, at the time in question, and if the jury believe, from the evidence, that the notes were given while the defendant was under arrest, and that the giving of the notes was induced by threats to prosecute the defendant for the offense of, etc., as stated and set out in the papers introduced in evidence in this case, or to further prosecute the defendant under such arrest, unless he should give such notes, then the said notes were obtained by duress, and are void as against the defendant; provided, the jury further believe, from the evidence, that the defendant, at the time, denied the justice and legality of the claim for which the notes were given.

If you believe, from the evidence, that the plaintiff maliciously, and without probable cause for such arrest, caused the defendant to be arrested for the purpose of compelling the defendant to settle up, or secure the payment of, etc., and that while under such arrest, and for the purpose of securing his discharge therefrom, the defendant executed and delivered the note in question, then the note was given under what the law terms duress, and the defendant is not liable thereon.

[*For Malice and Probable Cause, See Malicious Prosecution.*]

§ 54. **Giving Note not Payment.**—The court instructs the jury, as a matter of law, that the giving of a note in settlement of an account is not a payment of the account, unless the note

is of itself paid, or unless it is expressly agreed by and between the parties that the note shall of itself operate as payment of such account, and in this case, unless you find, from the evidence, that the note offered to be surrendered up by the plaintiff was taken by him under an agreement with the defendant, that the note should operate as payment of the account sued on, then the plaintiff's suit here is not barred or prejudiced, by the giving of said note.

§ 55. **New Party—New Consideration.**—That where one becomes a party to a note, after it has once been delivered, and the consideration passed, he will incur no liability unless there is a new consideration for his promise and a re-delivery of the note. *Williams vs. Williams*, 67 Mo., 661; *Briggs vs. Downing*, 48 Ia., 550.

CHAPTER XXXVI.

NOTICE.

- SEC. 1. Notice to agent.
2. Notice to corporation.
3. Facts calling for inquiry.
4. Recitals in deed.
5. Unrecorded deeds.

§ 1. **Notice to Agent.**—The jury are instructed, that it is a rule of law that notice to an agent is notice to his principal, and that what is known to an agent is known to his principal; provided, such notice or knowledge is received by the agent while he is acting as such agent. *Wade on Notice*, § 672; *Astor vs. Wells*, 4 *Wheat.*, 466.

Notice to an agent, in order to bind the principal, must be brought home to the agent, while engaged in the business or negotiation of the principal to which the notice relates; and when it would be a breach of trust in the former not to communicate the knowledge to the latter. *Pringle vs. Dunn*, 37 *Wis.*, 449.

While it is a general rule of law, that a notice to an agent is notice to his principal, still, in order to bind a person by notice to his agent, it must appear, from the preponderance of the evidence, that the alleged agent was the agent of the party sought to be charged in relation to the very matter to which the notice relates, and that the notice or information came to the knowledge of the agent while he was acting as such agent. *Wade on Notice*, § 689.

§ 2. **Notice to Corporation.**—The court instructs the jury, that notice to a corporation can only be given by giving it to some officer authorized to represent the corporation in the particular matter to which the notice relates; or else to some person whose situation and relation to the corporation imply authority to represent the corporation in such matter. 1 *Pars.*

on Cont., 66; *Keenan vs. Dubuque, etc.*, 13 Ia., 375; *Fulton Bk. vs. New York, etc.*, 4 Paige, 127; *Housatonic Bk. vs. Martin*, 1 Met., 294; *Bk. of the U. S. vs. Davis*, 2 Hill., 451; *Farmers', etc., Bk. vs. Payne*, 25 Conn., 444.

You are further instructed, that a single director, simply as such, has no authority to represent or bind a corporation; and although you may believe, from the evidence, that the said A. B. was a director in the defendant corporation, and that before, etc., and while he was such director, he had knowledge, or was informed of the fact, etc., still, these facts alone would not show notice to the defendant, nor bind the corporation in respect to such notice.

§ 3. **Facts Calling for Inquiry.**—The court instructs the jury, that whatever is sufficient to put a purchaser of land upon inquiry, as to the existence of an unrecorded deed, is sufficient notice of such deed. That in general, where notice is required to affect the rights of parties, a knowledge of such facts as ought to put an ordinarily prudent person upon inquiry, is deemed in law equivalent to notice of the facts, to the knowledge of which such inquiries would have led. *Bump on Fraud. Con.*, 232; *Forbes vs. How*, 102 Mass., 427; *Heaton vs. Prather*, 84 Ill., 330; *Rice vs. Melendy*, 41 Ia., 395.

Whatever is notice enough to excite attention, and put a party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led; and every unusual circumstance is ground of suspicion, and prescribes inquiry. *Russell vs. Rauson*, 76 Ill., 167.

The court instructs you, that to charge a person with notice, on the ground that he had knowledge of such facts as ought to have put him upon inquiry, it must appear, from the evidence, that the information he had received was of that character that it was calculated to excite the attention of an ordinarily prudent person, and that such person, by the exercise of reasonable and ordinary diligence, could, upon inquiry and investigation, arrive at the knowledge of the fact with which he is sought to be charged. *City of Chicago vs. Witt*, 75 Ill., 211.

§ 4. **Recitals in Deed.**—The jury are further instructed, that the recitals in the deed in the chain of title, under which

a person claims, are such notice to a purchaser of the property as will put him on inquiry as to the nature and effect of the matter referred to in the recitals. *C. & R. I. R. R. Co. vs. Kennedy*, 70 Ill., 350; *Mosle vs. Kuhlman*, 40 Ia., 108.

§ 5. **Unrecorded Deeds.**—The court instructs the jury, that a deed is valid between the parties without being recorded. The object of the recording law is to furnish notice as to the title to real estate, and of liens and incumbrances thereon; but in default of recording, if parties have such notice in any other form, all the purposes of the law are effected to the same extent as though the deed were recorded. *Russell vs. Rauson*, 76 Ill., 167; *Shotwell vs. Harrison*, 30 Mich., 179.

CHAPTER XXXVII.

PARTNERSHIP.

- SEC. 1. Who are in fact partners.
2. Partnership—How formed.
 3. As to third persons.
 4. Holding oneself out as a partner.
 5. Partnership in the name of one partner.
 6. Test of partnership—Partners as between themselves.
 7. Powers of partners to bind their firm.
 8. What acts do bind—Partner using partnership credit or effects.
 9. Acts beyond the scope of the partnership business.
 10. Bound by ratification.
 11. When fraud of one partner binds the other.
 12. Notice of dissolution necessary, when.
 13. Cannot sue each other at law.
 14. When may sue at law.

§ 1. **Who are Partners, in Fact.**—The court instructs the jury, that to constitute a partnership, as to the alleged partners themselves, it is only necessary that each of them contributes either capital, labor, credit or skill and care, or two or more of these, and that all the contributions are put together into a common stock or common enterprise, to be used for the purpose of carrying on business for the common benefit. Pars. on Part., 54; Story on Part., § 2.

§ 2. **Partnership—How Formed.**—A partnership can only exist as between the parties themselves, in pursuance of an express or an implied agreement, to which the minds of the parties have assented; the intention, or even belief, of one party alone cannot create a partnership without the assent of the others. Story on Part., § 86; Pars. on Part., 6; *Phillips vs. Phillips*, 49 Ill., 437.

§ 3. **As to Third Persons.**—The jury are instructed, that parties may so conduct themselves as to be liable to third persons as partners, when, in fact, no partnership exists as

between themselves. The public are authorized to judge from appearances and professions, and are not bound to know the real facts.

Persons may be co-partners, as to third persons, and brought within all the liability of partners, as to third persons, who are not partners as between themselves; and they will be so regarded, as to third persons, if they voluntarily and knowingly so conduct themselves as to reasonably justify the public, or persons dealing with them, in believing that they are partners. *Speer vs. Bishop*, 24 Ohio St., 598; *Dailey vs. Coons*, 64 Ind., 545.

§ 4. **Holding Oneself Out as Partner.**—The court instructs the jury, that if a person voluntarily and knowingly holds himself out, by his acts or language, to the public or to third persons, as the partner of another, and a third person deals with that other on the faith of an existing partnership, then the person so holding himself out will be liable as a partner to the person so dealing, notwithstanding there was, in fact, no such partnership. Pars. on Part., 61; *Smith vs. Knight*, 71 Ill., 148; *Peck vs. Lusk*, 38 Ia., 93; Story on Part., § 64; *Jenkins vs. Crane*, 54 Wis., 253.

If you believe, from the evidence, that prior and up to the time of the giving of the note, the defendant A. E. voluntarily and knowingly so conducted himself, in connection with the business carried on at, etc., as to reasonably justify the public and persons generally dealing at that place, in supposing and believing that he was a partner with said C., and that the plaintiffs, before they sold the goods, had been informed that the said A. E. was interested as a partner in that business, and that at the time they sold the goods and took the notes they supposed and believed that he was a partner, and acted on that supposition, then he would be liable on the note as a partner, whether he was, in fact, a partner or not.

If you believe, from the evidence, that prior and up to the time of the giving of the note introduced in evidence in this case, A. E. voluntarily and knowingly so conducted himself, in connection with the business of the firm of F. & E., as to justify the plaintiffs, and persons generally dealing with the firm, in supposing and believing that he was a member of that firm,

and that the plaintiffs, before they sold the goods for which the note was given, had knowledge of these facts, and were thereby induced to believe that A. E. was a partner in that firm, and that, at the time they sold the goods and took the note, they did suppose and believe that he was a member of the firm, then he would be liable on the note as a partner, whether he was, in fact, a partner or not.

When persons hold themselves out to the world by their acts or declarations as partners, they will be liable as such, whether such relation really exists between them or not. If they knowingly permit their names to appear in the style of the firm in the business cards, notices or advertisements of the firm, they cannot escape liability for debts contracted in the name of the firm. *Ellis vs. Bronson*, 40 Ill., 455; *Barnett, etc., vs. Blackmar*, 53 Ga., 98; *Dodd vs. Bishop*, 30 La. An., Part 2d, 1178.

If you believe, from the evidence, that prior and up to the time the note introduced in evidence in this case was given, A. E., voluntarily and knowingly, allowed and permitted the business of the firm of F. & E. to be conducted in such a way as to justify the public generally, and persons dealing with the firm, in supposing and believing that he was a member of the firm, and that the plaintiffs, before and at the time they sold the goods, and took the note in question, had reason to believe, and did believe, from the manner in which the business was conducted, that he was a member of the firm, then the plaintiffs will have a right to hold him liable on the note as a member of the firm.

And in such a case, it is immaterial whether A. E. made any representations personally to the plaintiff that he was a member of the firm or not.

§ 5. **Partnership in the Name of one Partner.**—The court instructs the jury, that although they may believe, from the evidence, that the business at S. was carried on in the name of J. C. alone, this fact would not be conclusive that no partnership existed. The question of partnership does not depend upon the name of the firm, but upon the agreement of the parties as to the ownership of the property, and as to the disposition to be made of the profits of the business.

If you believe, from the evidence, that L. and C. entered into an agreement, by which they were to engage in the business of, etc.; and that the business should be carried on in the name of L., with money to be furnished by C., L. agreeing to contribute his time and labor to the business, and that the parties should share equally in the profits thereof, and if you further believe, from the evidence, that the parties did engage in such business, under that agreement, then they were partners, so far as third persons were concerned.

§ 6. **Test of Partnership—Partners as between Themselves.**—The court further instructs the jury, that the criterion for determining whether a partnership exists as between the partners themselves, is to ascertain the intention and understanding of the parties themselves, at the time the partnership is alleged to have existed. Pars. on Part., 58.

And in this case, if you believe, from the evidence, that J. and E., at the time in question, did not intend, or understand that a partnership existed between them, and there was no agreement that they should share the profits of the said business of, etc., then, as to the matters involved in this suit, the question of partnership should have no bearing on your minds, in arriving at your verdict in this case.

That the best evidence and usual test of a partnership is the sharing, between the alleged partners, of the profits and losses of the business; and if you believe, from the evidence, that there never was any agreement between J. and E. to share the profits and losses of the business in question, then this would be evidence tending to show that no partnership did, in fact, exist between them.

§ 7. **Power of Partner to Bind the Firm.**—Every partner possesses full and absolute authority to bind all the partners, by his acts or contracts, in relation to the business of the firm, in the same manner, and to the same extent, as if he held full power of attorney from them; and as between the firm and third parties, who deal with it, in good faith and without notice, it is a matter of no consequence whether the partner is acting fairly with his co-partners, in the transaction, or not, if he is acting within the apparent scope of his authority, and

professedly for the firm. Pars. on Part., 172; Story on Part., § 101; *Pahlman vs. Taylor*, 75 Ill., 629; *First Natl. Bank vs. Carpenter*, 41 Ia., 518.

If a partnership, as such, engages in any transaction outside of its regular business, the acts and declarations of one partner, if proved, with respect to that transaction, bind the firm as much as though they were made with respect to some matter in the course of its ordinary and customary business. *Sandilands vs. Marsh*, 2 B. & Ald., 673; *Boardman et al. vs. Adams et al.*, 5 Ia., 224.

§ 8. **What Acts do not Bind—Partner Using Partnership Credit or Effects.**—The jury are instructed, that one partner has no right to apply the funds or securities, or other effects of the partnership, in payment of his own private debts, without the consent of his co-partners; and if he does so, the creditor dealing with such partner, if he knows the circumstances, will be deemed to have acted in bad faith, and in fraud of the other partners, and the transaction will be void as to them. Pars. on Part., 111; Story on Part., § 132.

You are further instructed, that one partner has no right or authority to use the credit of the partnership, or to give a note, in the name of the firm, for his own debt, or in his own individual transactions, without the consent of his copartners; and if he does so, the note or security given will be void in the hands of any person who has knowledge of the purpose for which, and the circumstances under which, such note or security was given.

You are further instructed that, when a note, or other security, is given in the name of the firm, by one partner, in payment of his own individual debt, the law raises a presumption that it was done without the knowledge or consent of the other partners, and the burden of proving such knowledge and consent, is upon the party alleging it. Story on Part., § 133; Pars. on Part., 112.

§ 9. **Acts Beyond the Scope of Partnership Business.**—The court instructs the jury, that each member of a firm is presumed to have, and has, authority to bind the firm within the scope of the partnership business; but in order to bind the firm in

matters outside of or beyond the apparent scope of the partnership business, the authority of one partner to act for the firm, must be shown, precisely the same as if any other person had performed the act. *McNair vs. Platt*, 46 Ill., 211; *Boardman et al. vs. Adams et al.* 5 Ia., 224.

§ 10. **Bound by Ratification.**—The jury are instructed, that while one partner cannot rightfully appropriate partnership funds to the payment of his individual debts, yet, if he does do so, his acts, when they come to the knowledge of the other members of the firm, should be clearly and promptly repudiated; and if, when such knowledge comes to the other members of the firm, they do not, within a reasonable time thereafter, repudiate the transaction, they will be deemed to have ratified it, and will be bound to the same extent as though they had expressly authorized it in the first instance. Whether, in this case, the debt in question was paid out of partnership funds by the said A. B., and whether the other partners had knowledge of that fact, and whether they did repudiate the transaction, and notify the said, etc., of that fact, as soon as it could reasonably be done, are all questions to be determined by the jury, from a consideration of all the evidence in the case. Pars. on Part., 111; *Marine Co., etc., vs. Carver*, 42 Ill., 66.

§ 11. **When Fraud of one Partner Binds the Other.**—The court instructs the jury, that if a fraud is committed by one partner, in the name of the firm, in the course of the partnership business, it will bind the firm, even though the other partners had no knowledge of the fraud, or participation in the transaction to which it relates. Story on Part., § 131; Pars. on Part., 150.

§ 12. **Notice of Dissolution Necessary, When.**—The court instructs the jury, that the law is, that when a partnership is dissolved, and one of the partners continues the business as before, the retiring partner, to protect himself from future liabilities, should see that public notice of such dissolution, or of his retirement, is given in some manner, so as fairly and reasonably to notify the public of the fact of his withdrawal from

the firm; and if he does not do so, persons dealing with the partner who continues the business, without actual notice of the dissolution, will have a right to rely on the credit of the original firm. Pars. on Part., 410; Story on Part., § 65, 160.

When one partner withdraws from the firm, and the business is continued by the other partners, the retiring partner should see that persons who have formerly dealt with the firm have reasonable notice of such retirement, or else those who continue to deal with the firm, without actual notice of his withdrawal, can hold him liable as a member of the firm. *Holtgreve vs. Wintker*, 85 Ill., 470; *Davis vs. Willis*, 47 Tex., 154; *Haynes vs. Carter*, 12 Heisk., 7; *Austin vs. Holland*, 69 N. Y., 571; *Gilcrist vs. Brande*, 58 Wis., 184.

§ 13. **Cannot Sue Each Other at Law.**—The court instructs the jury, that, under our practice, one partner cannot maintain an action at law against his copartner for work and labor performed, or for money paid, laid out or expended for, or on account of, the partnership, nor for the use or occupation of any of the partnership property.

If you believe, from the evidence, that the plaintiff and defendant were copartners during any portion of the time covered by the accounts in question, then you should exclude from their consideration, all items of account, concerning, or growing out of, the partnership business, if any such have been proved.

If you believe, from the evidence, that the plaintiff and defendant were partners as to a portion of the plaintiff's claim, and not partners as to the residue, then the fact of partnership will in nowise interfere with the plaintiff's right to recover as to such residue.

If you believe, from the evidence, that the parties to this suit, at the time in question, were partners, as to the said, etc., and in the use thereof, and that the charges in plaintiff's bill of particulars in relation to said, etc., and to the use thereof, are matters pertaining to the said partnership, and growing out of the same, and have never been settled or adjusted between the parties, then such matters cannot be litigated in this suit, and you should disregard all such items in making up your verdict.

§ 14. **When May Sue at Law.**—Although the jury may believe, from the evidence, that the plaintiff and defendant were formerly partners, and that the account sued on grew out of their partnership business, and is claimed by the plaintiff as the balance due to him, upon a settlement of such business, still, if the jury further believe, from the evidence, that the partnership had been dissolved, and the partnership business settled between the parties, and a balance struck and agreed upon as the amount due to the plaintiff, before the commencement of this suit, then the plaintiff can maintain a suit for such balance. *Wycoff vs. Parnell*, 10 Ia., 332; *Ridgway vs. Grant*, 17 Ill., 117.

CHAPTER XXXVIII.

REPLEVIN.

NO PLEA OF JUSTIFICATION.

- SEC. 1. When the action lies.
2. Right of possession of property sufficient.
3. Burden of proof and what must be proved.
4. Wrongful detaining—Burden of proof.
5. Wrongful detention—How proved.
6. Demand, when not necessary.
7. Demand, when necessary—Plea *non cepit* and *non detinet* only.
8. Wrongful taking or a demand must be proved.
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PLEA OF JUSTIFICATION.

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28. Liens of judgment and chattel mortgage.
29. Trover, property not found.
30. Bailee cannot deny bailor's title.

STOCK DISTRAINED.

31. Right to distrain cattle trespassing.
32. Must be taken, damage feasant.

NOTE.—The common law rules governing the action of replevin are variously modified by statute and by local usage, or practice, in the different states; but the following instructions will be found to be generally applicable to the practice in most of the states.

NO PLEA OF JUSTIFICATION.

§ 1. **When the Action Lies.**—The jury are instructed, that to entitle the plaintiff to recover under the issues in this case, it is only necessary that he should prove, by a preponderance of the evidence, that he was the owner of the property in question, and entitled to the possession of the same when this suit was commenced, and that it had been wrongfully taken from his possession by the defendant, or that it was then wrongfully detained by him. *Hill. on Rem. for Torts*, 2; *Esson vs. Tarbell*, 9 Cush., 407; *Eggleston vs. Mundy*, 4 Mich., 295; *Flatner vs. Good*, 29 N. W. Rep., 56; *Moore's Justice*, § 315 *et seq.*

§ 2. **Right to Possession of Property Sufficient.**—That it is not essential to a recovery by the plaintiff in this suit, that he should have been, at any time, the absolute owner of the property; it is sufficient if the proof shows, that before and at the time of the commencement of this suit, the plaintiff was entitled to the possession of the property; that he demanded the same of the defendant, before commencing the suit, and after the plaintiff became entitled to such possession, and that the defendant refused to surrender the property to the plaintiff upon such demand. *Campbell vs. Williams*, 39 Ia., 646; *Hill. on Rem. for Torts*, 20; *Noble vs. Epperly*, 6 Ind., 414; *Loomis vs. Youle*, 1 Minn., 175; *Bramwell vs. Hart*, 12 Heisk., 356.

The jury are instructed, that it is not necessary, in order to support this action, as regards the issue of wrongful detention, that there should have been a wrongful taking of the property by the defendant; provided, the jury believe, from the evidence, that the defendant had the same in his possession when this suit was commenced, and then wrongfully detained the same after a demand by the plaintiff for the possession thereof.

If the jury believe, from the evidence, that at the time this

suit was commenced, the plaintiff was lawfully entitled to the immediate possession of the property described in the declaration, and that the defendant had the same in his possession, and that before the suit was commenced, and while the plaintiff was so entitled to such possession, there was a demand made for the property by the plaintiff, and a refusal to deliver the same by the defendant, then the jury should find for the plaintiff, upon the issue of wrongful detention.

In this action, the title of ownership of the property is not necessarily involved. If the jury believe, from the evidence, that the defendant had the property in his possession, and that the plaintiff made a demand on him for it before commencing this suit, then the party who was entitled to the possession of the property at that time, is the one entitled to your verdict in this case, as regards the issue of wrongful detention.

§ 3. **Burden of Proof—What Must be Proved.**—The jury are instructed, that before the plaintiff can recover in this action he must prove, by a preponderance of evidence, that at the time of the commencement of this suit he was the owner of the property in question, or that he was then entitled to the immediate possession of the same, and he must also further prove, by a preponderance of the evidence, that the defendant wrongfully took the property in question, or else that he wrongfully detained it from the plaintiff, after a demand made upon him by the plaintiff for the property. *Bardwell vs. Stubbbs*, 23 N. W. Rep., 344.

In actions of this kind, if there is no evidence of a wrongful taking of the property, and no proof of a demand of the property before the commencement of the suit, then the plaintiff is not entitled to recover, unless the jury find, from the evidence, and the instructions of the court, that the defendant has, in some other manner, manifested an intention to resist the plaintiff's claim to the property, or his right to the possession thereof.

In this case neither a wrongful taking nor a wrongful detention of the property is to be presumed without proof, but to warrant a verdict against the defendant, his guilt must be proved, by a preponderance of the evidence.

§ 4. **Burden of Proof of Wrongful Retaining.**—The court instructs the jury, that to entitle the plaintiff to recover upon the issue of detention, it is incumbent upon the plaintiff to establish, by a preponderance of evidence, that the goods and property replevied were in the possession of the defendant, or under his control, and that he detained the same from the plaintiff at the time the suit was commenced; and unless the jury believe, from the evidence, that the property in question was in the possession of the defendant, or subject to his control at the time the suit was commenced, and that he then detained the same from the plaintiff, then, as to the issue of wrongful detention, the jury should find for the defendant. *Reynolds vs. McCormick*, 62 Ill., 412.

§ 5. **Wrongful Detention, How Proved.**—The court instructs the jury, that if they believe, from the evidence, that the plaintiff was entitled to the possession of the property before, and at the time of, the commencement of this suit, and that a demand for the possession was made by the plaintiff upon the defendant, and a delivery of the property refused by him, while the plaintiff was so entitled to possession, and before the commencement of this suit, then such demand and refusal are evidence of a wrongful detention; but they are not necessarily the only evidence of such detention; other facts and circumstances tending to show such detention, if proved, are proper evidence to be considered by the jury; and if they believe, from the evidence, and from such other facts and circumstances as the jury find to have been proved, that there was a wrongful detention of the property, as explained in these instructions, then the proof of demand and refusal was unnecessary to prove a wrongful detention.

§ 6. **When Demand not Necessary.**—If the jury believe, from the evidence, under the instruction of the court, that the plaintiff was the owner of the property, and entitled to the possession of it, and that the defendant took the property wrongfully from the possession of the plaintiff, then a demand and refusal before the commencement of this suit is not necessary to be proved, under the issues in this case, to entitle the plaintiff to recover. *Dickson vs. Randal*, 19 Kans., 212; *Jones vs. Ward*, 77 N. C., 337.

When property is wrongfully taken from the possession of the party legally entitled thereto, then no demand for the property is necessary to enable the person so entitled to the possession to bring his suit in replevin. And in this case, if the jury believe, from the evidence, that the plaintiff was the owner of the (*heifer*) in question, and that defendant went to plaintiff's pasture and took the (*heifer*) therefrom without plaintiff's permission, and against his will, then no demand was necessary before commencing this suit. *Gilchrist vs. Moore*, 7 Ia., 9; Hill. on Rem. for Torts, 67; *Newman vs. Jenne*, 47 Me., 520; *Stillman vs. Squire*, 1 Denio, 327; *Rhoades vs. Drummond*, 3 Col., 374.

The court instructs the jury, that by this plea in this case, the defendant claims title to the property in himself, (*and in one A. B.*), and denies the right of property and of possession in the plaintiff; and although the jury may believe, from the evidence, that the defendant came rightfully into possession of the property, still, under the pleadings in this case, it is wholly unnecessary for the plaintiff to prove a demand and refusal before commencing the suit, to entitle him to a verdict of wrongful detention; provided, the jury further believe, from the evidence, under the instructions of the court, that the plaintiff was entitled to the possession of the property at the time of the commencement of the suit. *Seaver vs. Dingley*, 4 Greenlf., 306; *Lewis vs. Masters*, 8 Blackf., 244; Hill. on Rem. for Torts, 66; *Smith vs. McLean*, 24 Ia., 322; *Lewis vs. Smart*, 67 Me., 206.

If the jury find, from the evidence, under the instructions of the court, that the defendant came lawfully into the possession of the property in controversy, then they will find for the defendant, unless they further find, from the evidence, that the plaintiff, prior to the commencement of this suit, made a demand upon the defendant for the property, and that the defendant refused to surrender it upon such demand, unless the jury further find, from the evidence, that before the commencement of this suit the defendant had, in some manner, manifested an intention to resist the plaintiff's claim to the property, or to deny his right to the possession thereof.

§ 7. When Demand Necessary—Pleas Non Cepit and Non Detinuit Only.—If the jury believe, from the evidence, that the

property in question came into the possession of the defendant with the knowledge and consent of the plaintiff, then, before the plaintiff could properly commence this suit, he would have to make a demand on the defendant for a return of the property, and unless it appears, from a preponderance of the evidence, that he did make such demand, the jury should find for the defendant, unless the jury further believe, from the evidence, that the defendant, before the commencement of this suit, had, by his conduct or language, or by both, manifested an intention to disregard and repudiate any claim of right or title in the property by the plaintiff. Hill. on Rem. for Torts, 67; *Lewis vs. Masters*, 8 Blackf., 244; *Kellogg vs. Oleson*, 2 N. W. Rep., 364.

That if the jury believe, from the evidence, that the defendant borrowed the property in controversy from the plaintiff for a temporary use or purpose, giving the plaintiff to understand that he would return the property whenever the plaintiff should desire it, then the plaintiff would not be entitled to commence this suit until after he had first demanded the property from the defendant; and if the plaintiff has failed to show such demand and refusal, by a preponderance of evidence, then the jury should find for the defendant; provided, the jury further find, from the evidence, that before the commencement of this suit, the defendant had done no act inconsistent with the plaintiff's right to the property, or showing an intention to repudiate the same. *Simpson vs. Wrenn*, 50 Ill., 222; Story on Bailments, § 266; Moore's Justice, 322.

§ 8. **Wrongful Taking or Demand must be Proved.**—If the jury believe, from the evidence, that at the time this suit was brought, the plaintiff was entitled to the possession of the property, still he is not entitled to recover in this suit upon the issue of wrongful detention, unless it appears, from the evidence, that the defendant wrongfully took the property, or unless the plaintiff has proved a legal demand for the property before this suit was brought, or some other facts and circumstances showing an unlawful detention by the defendants, as explained in these instructions.

§ 9. **What Essential to a Demand.**—In order to make a legal demand of articles of personal property by one person from another, such property must be indicated by name or by proper words of description, or reference, so as to apprise the party upon whom the demand is made what particular property is demanded; otherwise such demand would not be sufficient whereon to bring replevin for the detention of such property.

[See *Trover*.]

PLEA OF JUSTIFICATION.

§ 10. **Replevin against an Officer.**—The court instructs the jury, that if they believe, from the evidence, that the defendant R. was a constable of this county at the time of the levy of the execution, offered in evidence in this case, and that under such execution, as such constable, he levied upon the property in question on, etc., at, etc., and also that the property so levied upon was then the property of the defendant in the execution, then the jury should find for the defendant.

The justice's docket, introduced in evidence in this case, is sufficient evidence of the rendition of the judgment mentioned in the plea, and the jury should consider that fact as proved.

§ 11. **Execution Conclusive as to Third Person, or if not Disputed.**—That the execution with the indorsement thereon, introduced in evidence in this case, is sufficient proof of the issuing of the execution mentioned in the plea, the time when the same was received by the officer, the date of the levy, and the sale of the property in question, and the jury should consider all these matters proved, as they appear in the execution and the indorsements thereon.

§ 12. **Execution and Indorsements Prima Facie Evidence, When.**—The jury are instructed, that as regards the defendants, C., D. and E. (*the officer and plaintiffs in execution*), the indorsements and return of the officer upon the execution read in evidence, are *prima facie* proof of the time when the execution came into the hands of the officer, the time of the levy, upon what property the same was levied, and what became of the property. Hill. on Rem. for Torts, 391; *Phillips vs. Elwell*, 14 Ohio St., 240; *Harper vs. Moffit et al.*, 11 Ia., 527.

§ 13. **Justification under Execution—When Demand Necessary.**—The jury are instructed, that if they believe, from the evidence, that the defendant A. B. was an acting constable in and for the county of C., and that as such constable, the execution shown in evidence came into his hands, to be executed by him, and that while the property in dispute was in the possession and under the control of one or both of the defendants in said execution, the said constable levied the execution upon the property in controversy, as the property of one or both of the defendants, such taking and levy would not be unlawful as to the plaintiff, and in such case, unless the jury believe, from the evidence, that a demand for the property was made before bringing this suit, then the defendant would not be guilty of a wrongful taking, or of a wrongful detention. *Tuttle vs. Robinson*, 78 Ill., 332.

§ 14. **Interest of Joint Owner.**—One of the questions before the jury in this case is the ownership of the property at the time the execution was placed in the hands of the officer (*or was levied on the property in controversy*); and if the jury find, from the evidence, that W. J., the defendant in the execution, owned the property levied on, or had an interest therein as partner at the time of the delivery of the execution to the officer (*or at the time the execution was levied on the property*), then the property, or such interest therein, was subject to the lien of such execution and to a sale under the same, and the plaintiff cannot recover.

§ 15. **Property Replevied from an Officer—Burden of Proof.**—The jury are instructed that the burden of proof is on the plaintiff to establish, by a preponderance of evidence, his right to the possession of the property in controversy; and if the jury believe, from the evidence, that the plaintiff has not established his right to the possession of the property at the time of the levy, by a preponderance of the evidence, the jury should find for the defendant.

§ 16. **Plea of Property in A. and B., Attachment Debtors.**—The jury are instructed, that if they find, from the evidence, and under the instructions of the court, that at the time the attach-

ment writ was levied, A. or B. had any interest in the property in question, which was subject to the attachment writ, as explained in these instructions, then the jury should find the right of property in the said A. and B., or in one of them, as the case may be, and find the defendant not guilty.

If the jury find, from the evidence, under the instruction of the court, that neither A. nor B. had any interest in the property, and further, that the plaintiff was the owner of, and entitled to the possession of the property at the time this suit was commenced, then the jury should find the property in the plaintiff, and find the defendant guilty; provided, the jury further find, from the evidence, that the defendant wrongfully took, or wrongfully detained the property, as charged in the declaration, and as explained in these instructions.

§ 17. **Plea, Property in a Stranger.**—The court instructs the jury, that the defendant in this case, with his other pleas, has pleaded property in himself, and also in one A. B.; and if the jury believe, from the evidence, that the defendant has shown property in himself, or in the said A. B., he will be entitled to a verdict from the jury, that they find the property in the defendant, or in the said A. B., as the fact may be found by the jury.

§ 18. **Possession Evidence of Title.**—The court instructs the jury, that under the issues in this case, the burden of proving property in himself, so far as the right of property is concerned, is upon the plaintiff; and if possession of the property has been shown by the evidence to have been with the said A. B. at the time it is alleged to have been levied upon, then such possession is *prima facie* evidence of title in the said A. B. Hill. on Rem. for Torts, 62; *Martin vs. Ray*, 1 Black., 291.

§ 19. **Lien of Execution by Statute.**—The jury are instructed, that the execution read in evidence, was a lien upon all the personal property of A. B., the defendant therein, from the time the execution came into the hands of the officer, and that no sale or transfer of such property, by the said A. B., after that time, could destroy or affect such lien. And if the jury

believe, from the evidence, that the alleged sale and delivery of the property, by A. B. to the plaintiff, was made after the execution came into the hands of the officer, such sale would be void as against the execution creditors, no matter whether made in good faith and for a valuable consideration or not, and the property could properly be taken on the execution. *Childs vs. Jones*, 60 Ala., 352; *Marsh vs. Newton*, 71 Ind., 22.

§ 20. **Fraudulent Sale.**—If the jury believe, from the evidence, that the property in question was sold to the plaintiff by the defendant in the execution, before the execution came into the hands of the officer (*before the execution was levied, etc.*), still, if the jury further believe, from the evidence, that such sale was made to hinder or delay the creditors of the said defendant in the collection of their debts, and that the plaintiff knew of the purpose of such sale and was a party to it, assisting in such fraudulent purpose, then such sale was void as against the execution creditors, whether the plaintiff paid a valuable consideration for the property or not.

If the jury believe, from the evidence, that the property in controversy was in the possession of the plaintiff, he claiming to be the owner thereof at the time it was taken upon the execution, this is *prima facie* evidence of ownership in him. And if the jury further believe, from the evidence, that while the plaintiff was so in possession the defendant took the same from him, then the jury should find the right of property in the plaintiff, unless the jury further find, from the evidence, that the plaintiff did not own the property, or that the sale thereof from C. to the plaintiff, was made with a view, on the part of C., of hindering, delaying or defrauding his creditors, and that the plaintiff knew, or had good reason to know, of such fraudulent purpose, at the time he purchased the property.

§ 21. **Temporary Possession by Vendor.**—If the jury believe, from the evidence, that before the execution came into the hands of the officer (or was levied upon the property), the plaintiff bought the property from the defendant, in the execution, in good faith, for a valuable consideration, and on the same day took actual possession of the property, then, although

the jury may further believe, from the evidence, that he afterwards loaned the property back to the defendant in the execution, for a temporary purpose, such loaning back, if made in good faith, would not alone render or make void the plaintiff's title to the property, nor make it subject to the execution.

§ 22. **Growing Crops, When Personal Property.**—The court instructs the jury, that growing crops, in law, are regarded for some purposes as personal property, and for some purposes as a part of the real estate upon which the crops are growing. As between seller and purchaser of real estate, they are regarded as belonging to the real estate, and will pass with the conveyance of the land to the purchaser, unless they are expressly reserved in writing. *Carpenter vs. Jones*, 63 Ill., 517.

§ 23. **Levy on Crops and Taking Possession.**—Although the law requires an officer, in levying on personal property, to take the same into his possession, yet, in the case of growing crops, or other bulky or heavy articles, it only requires him to take such possession thereof, as the article, from its nature, will reasonably admit of; and if the jury believe, from the evidence in this case, that the officer, in attempting to make the levy in question, went to the fields of grain levied on, and had the same in his immediate view and presence, and notified the defendant in the execution that he had taken the crops, under the execution introduced in evidence, this would be a sufficient levy on the property in question. *Pierce vs. Roche*, 40 Ill., 292.

§ 24. **Property Cannot be Taken from one Holding it under Replevin Bond.**—If the jury believe, from the evidence, that before the time of the levy of the execution, in this case, the plaintiff has commenced a suit in replevin, etc., for the goods in controversy, and that the goods were delivered to him under the bond given by him in the replevin suit and that, at the time of the levy of the execution, the action of replevin was still pending and plaintiff's bond was still held by the officer for the return of the goods, then the plaintiff had, during the pendency of such replevin suit, the legal right to the pos-

session of said goods. The action of replevin is a proceeding against the property as well as against the person, and where the plaintiff gives a bond and receives the property from the officer who replevies it until the end of the replevin suit, the property is regarded as in the custody of the law, the plaintiff becomes its custodian, and property so held cannot be levied upon and taken from the plaintiff in replevin, and any attempt to take it is a trespass.

§ 25. **Property of Minor Child.**—If the jury believe, from the evidence, that the plaintiff with the knowledge, permission and consent of his father, earned money during his minority in working for persons other than his father and that the father consented to said earnings being paid to his son and that they were so paid to him, then the money so earned was the property of the plaintiff, and he could appropriate and use it as he saw fit so far as the issues in this case are concerned.

If the jury believe, from the evidence, that the plaintiff received the horse, when a colt, as a gift from his father, and that the father at the time he made the gift had other property, enough to pay all the debts he owed at that time, then it is a matter of no importance whether he had property enough to pay all his debts last spring or at any other time since such gift was made.

§ 26. **Right of Property in the Plaintiff to a Part, etc.**—In rendering their verdict in this case, the jury have a right to find the right of property, in a portion of the property in question, in one party, and the remainder in another party, if they believe, from the evidence, that such is the fact. If the jury do so find, they should so state in their verdict.

§ 27. **Building Personal Property, When.**—The court instructs the jury, that where a building is owned by one person, and the land on which it stands is owned by another, then the building is personal property; and it will always remain personal property until the ownership of the land, and that of the building, unite in the same person. *Crippin vs. Morrison*, 13 Mich., 23.

Where one wrongfully places his building upon the lot of

another, in such a way as to attach it to the ground, the building will belong to the owner of the land; but where one rightfully and lawfully places his building on the land of another, without any intention of having it belong to the owner of the land, then it will not belong to such owner. Cooley on Torts, 307; 1 Hill. on Torts, 470; *Adams vs. Goddard*, 48 Me., 212; 1 Hill. on Real Prop., 5.

Where the building of one person stands upon the land of another, a purchaser of the land will not become the owner of the building, unless the owner of the building has abandoned the possession of it, so that the purchaser of the land has no notice of the builder's rights in the premises.

To make a house a part of the real estate, it is not necessary that it should be so affixed that detaching it will disturb the earth, or rend any part of the building. Where a house is erected on a lot by any person claiming to own the land, and intended by him, at the time, as a permanent fixture, the house will become a part of the real estate, no matter how it may be built upon the land.

If the jury believe, from the evidence, that R. was the owner of the land on which the building in question stands, and that M., as the tenant of R., placed the building on the land with R.'s consent, and with the understanding or agreement with R. that M. might remove the same at the expiration of his lease, then the building would be personal property, and it would not be conveyed by a conveyance of the land, so long, at least, as M. and those holding under him continued in possession of the property, under the lease. Cooley on Torts, 306; *Barnes vs. Barnes*, 6 Vt., 388; *Smith vs. Benson*, 1 Hill., 176.

The jury are instructed, that although a building is *prima facie* real estate, and belongs to the owner of the land on which it stands, still it may be personal property, and owned by a person who is not the owner of the land; and the building is personal property when it is erected by the builder, with his own means, and for his own use, on the land of another, in pursuance of an understanding between him and the owner of the land, that the building shall belong to the builder.

If the jury believe, from the evidence, that M. took pos-

session of the land on which the building stands, under a lease from R., with the privilege of removing any improvements placed thereon by himself, at or before the expiration of the lease, and further, that M. continued to hold over and occupy the premises, either by himself or his tenant, after the expiration of the lease, with the knowledge and consent of R., then the law would presume that such holding over was upon the same terms as to the right to remove improvements, as were contained in the original lease.

If the jury believe, from the evidence, that before the house in question was built, the plaintiff and defendant entered into a contract, by which defendant agreed to purchase the land where the house was built from the plaintiff, and, under that contract, went into possession of the land and erected the house thereon, with the intention of having it remain there as a permanent fixture to the land, then the house, as soon as it was built, became a part of the real estate, and in law belonged to the owner of the land, and any alleged contract authorizing the defendant to remove the house therefrom, would have to be in writing to be binding on the plaintiff. *Crum vs. Hill*, 40 Iowa, 506; 1 Hill. on Torts, 469; *Groff vs. O'Conner*, 16 Ill., 421.

§ 28. **Lien of Judgment and Chattel Mortgage.**—The jury are instructed, that a judgment is not a lien upon personal property of the debtor; an execution becomes a lien upon such property from the time it is received by the officer (*or levied on the property*), and not before.

If the jury believe, from the evidence, that plaintiff's chattel mortgage was made in good faith to secure a *bona fide* indebtedness, and that it was acknowledged, entered upon the justice's docket, and recorded in the recorder's office, before the execution came into the officer's hands (*or was levied on the property*), then the mortgage will hold the property in preference to the execution.

If the jury believe, from the evidence, that the plaintiff's only claim to the property in question was derived from the mortgage in evidence, and that the property was allowed to remain in the possession of the mortgagor, after the expiration of the time for the payment of the debt secured by said mort-

gage, and after a reasonable time for the mortgagee to take possession of the property, and that while it was so in the possession of the mortgagor, the execution introduced in evidence was placed in the hands of the officer (*or was levied on the property*), then the law is, that the property was liable to such execution. *Whisler vs. Roberts*, 19 Ill., 274.

§ 29. **Trover—Property not Found.**—The jury are instructed, that if they believe, from the evidence, that the plaintiff was the owner of the property in question, and entitled to the possession thereof before and at the time of the commencement of this suit, and that the defendant was guilty of the wrongful taking (*or of the wrongful detention*) of the same, then, if for any cause, the property, or any part of it, was not found or taken on the replevin writ, the plaintiff is entitled to recover in this suit the value of the property not so found or taken, and such damages, if any are proved, as the plaintiff has sustained by the wrongful taking and detention (*or by the wrongful detention*) of the remainder of the property.

If the jury believe, from the evidence, that either from want of title, or from want of demand for the possession of the property before suit was brought, the plaintiff had no right to the possession of the property, as explained in these instructions, when the replevin writ was issued, then he cannot recover for the value of the property in controversy in this suit.

§ 30. **Bailee Cannot Deny Bailor's Title.**—The court instructs the jury, that if they believe, from the evidence, that the defendant borrowed the property in controversy from the plaintiff for a temporary use or purpose, with the understanding that he would return the property when demanded, and that afterwards, and before the commencement of this suit, the plaintiff made such demand, and that, upon such demand, the defendant refused to deliver up the possession of the property, then the jury should find the right of property in the plaintiff, and the defendant guilty of a wrongful detention of the same. *Simpson vs. Wrenn*, 50 Ill., 222.

The court further instructs the jury, that if they believe, from the evidence, that the defendant borrowed the property in controversy from the plaintiff, then the defendant became

the bailee of the plaintiff, and he cannot set up title to the property in himself in this action to defeat the plaintiff's right of recovery; and if the jury further believe, from the evidence, that before the commencement of this suit, the plaintiff demanded the property from the defendant, and that he refused to give it up, claiming it as his own, then the jury should find the property in the plaintiff, and the defendant guilty of a wrongful detention.

STOCK DISTRAINED.

§ 31. **Right to Distrain Cattle Trespassing.**—The court instructs the jury, that, by the laws of this state, if any (*cattle or hogs*) shall be wrongfully trespassing upon the premises of another, the owner or occupier of such premises may take such animals into his possession, and keep the same until all damages, with reasonable charges for keeping and feeding, are paid, or until such occupier or owner of the premises shall have had reasonable time to recover the same by suit against the owner of the stock; provided, that within (*twenty-four hours*) from the time of taking up said stock, the person so taking them up notify the owner that he has done so.

The jury are instructed, that at the time and place of the committing of the alleged trespass, as complained of in this suit, no one was bound to fence his land against cattle that were permitted by the owner to run at large in the public streets or highways, and in such case, when cattle are allowed to run at large in the public highway, the owner is bound to take such measures as will prevent their escaping from the highway upon the adjoining lands of others; and if they do so escape, they are, within the meaning of the law in this case, wrongfully upon the land of such other person, whether such lands are protected by a good and sufficient fence or not.

When the cattle of one person are wrongfully trespassing upon the lands of another, as explained in these instructions, the owner of the land has a right to take up such cattle while so trespassing, and to detain them in his possession to secure the payment of the damages done, if any, together with reasonable charges for feeding and keeping the same; and he has (*twenty-four hours*) in which to notify the owner that he has taken them up.

If the jury believe, from the evidence, that the cattle in question either escaped from the defendant's pasture or were permitted by him to run at large in the public highway, and while so upon the public highway, they escaped therefrom, and went upon the plaintiff's land without his knowledge or consent, then they were wrongfully upon such land, and the owner had a right, while they were there, to distrain them, by taking them into his possession, and keeping the same until all damages, with reasonable charges for keeping and feeding the stock, were paid by the owner; provided, that within (*twenty-four hours*) from the time of taking up said stock he notified the owner that he had done so.

§ 32. **Must be Taken Damage Feasant.**—The court instructs the jury, that, to warrant the distraining of cattle *damage feasant*, the cattle must be upon the premises owned or occupied by the party distraining at the time they are distrained.

The fact, if proved, that cattle may have passed over the premises owned or occupied by a person, will not warrant a distraint of the cattle after they get onto the premises of another.

The owner or occupier of land has no right to distrain cattle found upon his premises for damages done at another time than the one when the distraint is made, whether such damage was done upon the same or upon other lands of the party distraining.

CHAPTER XXXIX.

RESIDENCE AND DOMICIL.

- SEC. 1. Residence and domicile defined.
2. Domicil of husband that of wife.
3. Change of domicile or residence.

§ 1. **Residence and Domicil Defined.**—The court instructs the jury, that there may be a distinction between a man's domicile and his residence; a person may have a domicile in one place and his residence in another—a man's domicile is that place where he has his true, fixed and permanent home; two things must concur to establish a domicile, the fact of residence and the intention of remaining, while to constitute residence within the legal meaning of the term, it is sufficient if the person has a settled, fixed abode for the time being for business or for other purposes.

§ 2. **Domicil of Husband That of Wife.**—The jury are further instructed, as a matter of law, that the domicile of the husband upon marriage at once becomes the domicile of the wife, and the domicile of the wife continues to be the same as that of the husband so long as they remain together as husband and wife. *Bouvier's Law Dic.; Webster's Dic.; Board of Sups. vs. Dav-enport*, 40 Ill., 197.

§ 3. **Change of Domicil or Residence.**—The court instructs the jury, that to constitute a change of domicile, there must be the act of removal combined with the intention of remaining. If the jury believe, from the evidence, that J. L., the husband of the defendant, some time and about, etc., removed from this state to, etc., with the intention of taking up his permanent residence there and without the intention of returning to this state as a place of residence, and that he never did return to this state, then the domicile of the said J. L., at the time of his death, was not in this state. *Hayes vs. Hayes*, 74 Ill., 312.

The domicil of the husband is that of the wife so long as they live together as husband and wife, and the domicil of the widow continues to be that of her late husband until she changes it of her own volition, and, if she does change her domicil of her own motion and volition by taking up her permanent residence elsewhere, then the presumption that her domicil is that of her late husband ceases. *Kennedy* vs. *Kennedy*, 87 Ill., 250; *Smith* vs. *Smith*, 28 N. W. Rep., 296.

CHAPTER XL.

SALE OF PERSONAL PROPERTY.

- SEC. 1. When the title passes.
2. Conditional sale.
3. Transfer of the bill of lading.
4. A thief acquires no title—He can convey none.

§ 1. **When Title Passes.**—There is a difference between a sale of personal property and an agreement to sell; under a mere agreement to sell no title passes; but whenever parties have agreed upon the terms of a sale and the precise property sold is identified and nothing remains to be done but to deliver it, and it appears, from the evidence, that the parties understood and intended the title to pass without actual delivery, then the title will pass without such delivery; but where anything remains to be done, by way of selecting out or separating the property from other property of the same kind, for the purpose of identifying the property sold, then no title will pass until the property has been so selected and identified. *Robinson vs. Hirshfelder*, 59 Ala., 503; *Smith vs. Sparkman*, 55 Miss., 649; *Fletcher vs. Ingram*, 46 Wis., 191; *Hahn et al. vs. Fredricks*, 30 Mich., 223.

If the jury believe, from the evidence, that the lumber which the plaintiff claims to have bought was standing in a pile by itself, and that the plaintiff and the said A. B., upon the occasion in question, were speaking of that particular lot of lumber and the plaintiff said, I will take the lumber at \$20 per 1,000, and the said A. B. replied, you can have it (or the lumber is yours), this would constitute a valid sale and sufficient to pass the title at that time to the plaintiff, although the quantity of lumber in the pile was then unknown, and it was necessary to measure the lumber to ascertain the quantity or the amount of money to be paid therefor. *Burrows vs. Whitaker*, 71 N. Y., 291.

If the jury believe, from the evidence, that at the time of

the alleged sale A. was indebted to B. in the sum of \$—, and that A. turned out and sold the lumber in question to B., under an agreement between them that the same should be applied in payment or in part payment of such indebtedness, and that they then put the lumber in charge of one C., and that he agreed to take charge of the same and look after it for B., then such transaction amounted to a completed sale and transfer of the title, although the jury may further believe, from the evidence, that the amount of the lumber was to be ascertained by future measurement, and the purchase price to be determined by future inspection, the purchaser to pay any excess of the purchase price over his debt, and the seller to make good any deficiency. *Colwell vs. Keystone Iron Co.*, 36 Mich., 51.

If the jury believe, from the evidence, that the plaintiffs delivered the property in question to the said P. under an agreement by which P. was to hold the same as the property of the plaintiffs until he paid them the sum of \$—, in weekly installments of \$—, per week, and that the said P. has never fully paid the said sum of \$—, but did attempt to sell the said property to the defendant, and that the defendant took the property in good faith, still the defendant, in such case, acquires no better title to the property than the said P. himself had, and the jury should find the right of property in the plaintiff. *Sanders vs. Keber et al.*, 28 Ohio St., 630.

§ 2. **Conditional Sale.**—The jury are instructed, as a matter of law, that where personal property is agreed to be sold and is delivered under an agreement that the same is to be paid for in future installments payable at different times, the ownership and title of the property to remain in the vendor until the full payment of the purchase price, then the full payment is a condition precedent, and until a full performance the property does not rest in the purchaser.

If the jury believe, from the evidence, that the plaintiff sold the machine in question to A. B. at an agreed price to be paid at a future time, and then delivered the said machine to the said A. B., but upon the express condition and agreement that no title should pass to him until after the purchase price was paid in full, and that, in the meantime, the title should remain in the plaintiff, then, if the jury further believe, from

the evidence, that the purchase price has never been paid in full, the machine still remains the property of the plaintiff. *Jowers vs. Blandy*, 58 Ga., 379; *Bradshaw vs. Warner*, 54 Ind., 58.

The court instructs the jury, that although the written contract introduced in evidence in terms speaks of the said machines as having been rented from the said plaintiff to the said P. and calls for installments of payments to be paid as rent, still, if the jury believe, from the evidence, and from all the facts and circumstances proved on the trial, that a sale was, in fact, intended between the parties, and that stipulated payments were in reality understood to be payments upon the purchase money, and that the machine was delivered by the said plaintiff to the said P. under such contract, and if the jury further believe, from the evidence, that the defendant afterwards purchased the said machine from the said P. in good faith, relying upon his possession and apparent ownership, and paid him for the same, and without any knowledge that the plaintiff had not been paid in full therefor or that he set up any claim to the said machine, then the jury should find the right of property in the defendant. *Geer vs. Church*, 13 Bush, 430; *Domestic Sewing Machine Co. vs. Anderson*, 23 Minn., 57.

§ 3. **Transfer of Bill of Lading.**—The jury are instructed, as a matter of law, that the transfer of a bill of lading in good faith in the ordinary course of business and for valuable consideration operates to transfer to the holder thereof the title to the goods mentioned or covered by the bill of lading. *Davis vs. Russell*, 52 Cal., 611; *Cochrane vs. Riply*, 13 Bush, 495; *Cent. Sav. Bk. vs. Garrison*, 2 Mo. App., 58; *Price vs. Wisconsin Ins. Co.*, 43 Wis., 267.

§ 4. **A Thief Acquires no Title and Can Convey None.**—The court instructs the jury, that by a larceny of goods a thief acquires no title to them, and if he attempts to sell the goods he cannot convey any title to them as against the person from whom they were stolen. But whether, in this case, the horse formerly belonged to the plaintiff, and whether the said A. B. stole the horse from him, etc., etc., are all questions of fact to be determined by the jury from the evidence in the case. *Breckenridge vs. McAfee*, 55 Ind., 141.

CHAPTER XLI.

SLANDER AND LIBEL.

SLANDER—NO PLEA OF JUSTIFICATION

- SEC. 1. Nature of the action.
2. Malice and damages presumed from speaking actionable words.
3. All the words need not be proved.
4. Malice defined.
5. Words presumed to have been used in their ordinary meaning.
6. Charge of fornication or adultery.

STATUTE OF LIMITATIONS PLEADED.

7. Charge of dishonesty.
8. Charge of arson by innuendo.
9. Charge of murder by innuendo.
10. Words must be proved as charged.
11. Words not spoken maliciously.
12. Anger no justification.
13. Anger in mitigation.
14. Slanderous words explained.

PLEA OF JUSTIFICATION.

15. All the words need not be proved.
16. Plea of justification, how proved.
17. When the plea does not impute crime.
18. Plea of justification filed in good faith.
19. Office of the plea of justification.
20. Repeating reports.

LIBEL.

21. Libel defined.
22. Malice defined.
23. Damages presumed, when.
24. Plea of justification.
25. Malice, when presumed.
26. How the words are to be understood.
27. Plea of justification an aggravation of damages.
28. Plea of justification, when not an aggravation.
29. Mitigation of damages.
30. No plea of justification filed.
31. General issue impliedly admits, etc.

NO PLEA OF JUSTIFICATION FILED.

§ 1. **Nature of the Action.**—The court instructs the jury, that slander is regarded in law as a malicious wrong and injury, and an action for it has as legitimate a standing in a court of justice as any other action.

§ 2. **Malice and Damage Presumed from Speaking Actionable Words.**—The jury are instructed, that words that impute to a party the commission of the crime of (*larceny*) are actionable in themselves, and the law presumes that the party uttering them intended maliciously to injure the person concerning whom they are spoken, unless the contrary appears from the circumstances, occasion or manner of the speaking of the words.

All the plaintiff is bound to prove on his part to entitle him to recover in this case is the speaking, by the defendant, of enough of the slanderous words charged in the declaration to amount to a charge of (*stealing or larceny*) against the plaintiff; and if the jury believe, from the evidence, that the defendant is guilty of the speaking of the slanderous words, charged in the declaration, of and concerning the plaintiff, then express malice or ill-will need not be proved. Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse. *Smart vs. Blanchard*, 42 N. H., 137; *Lick vs. Owen*, 47 Cal., 252; *Wilson vs. Noonan*, 35 Wis., 321; *Rearick vs. Wilcox*, 81 Ill., 77; *Pennington vs. Meeks*, 46 Mo., 217; *Indianapolis, etc., vs. Horrel*, 53 Ind., 527.

If the jury believe, from the evidence, that the defendant spoke and published, of and concerning the plaintiff, the words charged in the declaration, then the law presumes they were spoken maliciously, and with a view to defame and injure the plaintiff; and this presumption of law can only be rebutted by evidence that the words were spoken in what is known as a privileged communication, as explained in these instructions (and there is no evidence that they were so spoken in this case).

If the jury believe, from the evidence, that the defendant, in speaking of the plaintiff, in the presence and hearing of

others, used the words, "She is a whore," or "She is a damned whore," (*or other actionable words charged in the declaration*), then the words are actionable in themselves, and the law implies that they were used with a malicious intent to defame the character of the plaintiff, and express malice need not be proved. *Klewin vs. Bauman*, 53 Wis., 244.

If the jury believe, from the evidence, that the defendant spoke the words charged in the declaration, in the presence and hearing of others, intending to charge the defendant with having committed the crime of, etc., then the law will imply malice, and malice need not otherwise be proved.

§ 3. **All the Words Need not be Proved.**—The court instructs the jury, that while it is necessary to entitle the plaintiff to recover in an action of slander, that he should prove the slanderous words alleged in the declaration, still it is not necessary to prove all the words that are charged to have been spoken. It is sufficient to prove, substantially, the words in some one or more of the statements of slanderous words contained in the declaration. *Hill. on Rem. for Torts*, 375.

To authorize a verdict for the plaintiff in an action of slander, it is not necessary that all the slanderous words alleged in the declaration should be proved, unless it takes them all to constitute the slander charged; and, in this case, if the jury believe, from the evidence, that a sufficient number of the words charged in the declaration to amount, in their common meaning, to a charge of (*larceny*) against the plaintiff, have been proved to have been spoken by the defendant, as charged in the declaration, then the jury should find the issues for the plaintiff. *Baker vs. Young*, 44 Ill., 42; *Dufresne vs. Weise*, 46 Wis., 290; *Bolt vs. Budwig*, 28 N. W. Rep., 282.

§ 4. **Malice Defined.**—The jury are instructed, that the term malice has, in law, a two-fold signification. There is what is known as malice in fact and malice in law, or implied malice; in the legal sense. as applied to this case, malice signifies the motive which prompts a wrongful act intentionally done without justification or legal excuse, as explained in these instructions.

§ 5. **Words Presumed to be Used in their Ordinary Meaning.**—The jury are instructed, that when one person utters slanderous words concerning another, which, in their ordinary and common signification, impute the crime or offense of, etc., it must be presumed it was in that sense they were used, and understood by the bystanders who heard them, unless other words are used at the same time which limit or qualify the ordinary meaning of the slanderous words used; and a defendant, when sued, cannot excuse his guilty conduct by an explanation in his testimony, that he did not use the words to impute the crime or offense thereby indicated; provided, the jury believe, from the evidence, that the defendant spoke the words, as charged. *Miller vs. Johnson*, 79 Ill., 58.

§ 6. **Charge of Fornication or Adultery.**—The court instructs the jury, that words, which, in their common acceptance, amount to a charge of fornication or adultery, if spoken in the presence of others, and not spoken under privileged circumstances, or for justifiable ends, as explained in these instructions, are slanderous and actionable in themselves, and the law will imply malice from the mere speaking of such words. *Schmisseur vs. Kreilich*, 92 Ill., 347; *Dufresne vs. Weise*, 46 Wis., 290; *Bolt vs. Budwig*, 28 N. W. Rep., 282.

The words, etc., charged in the declaration, do amount to a charge of fornication or adultery; and if the jury believe that the defendant uttered those words of and concerning the plaintiff, in the presence and hearing of others, as charged in the declaration, the jury should find the defendant guilty.

STATUTE OF LIMITATIONS PLEADED.

§ 7. **Charge of Dishonesty.**—If the jury believe, from the evidence, that at or about the time charged in the declaration, the plaintiff was engaged in the business of, etc., and that the defendant, in a conversation with the plaintiff, in the presence and hearing of other persons, within (*one year*) before the commencement of this suit, said to the plaintiff, “You are a rascal; you have put your property out of your hands to cheat your creditors out of their pay,” and that this was said with an intent to charge the plaintiff with having fraudulently conveyed his property with intent to defraud his creditors, or to

hinder or delay them in the collection of their just debts, then the jury should find the defendant guilty, and assess the plaintiff's damages at what they think is just and right, under the evidence in this case. *Cooley on Torts*, 202; *Nelson vs. Borchanius*, 52 Ill., 236; *Phillips vs. Hoefler*, 1 Penn. St., 62; *Fitzgerrold vs. Redfield*, 51 Barb., 484; *Orr vs. Skofield*, 56 Me., 483.

If the jury believe, from the evidence, that at or about the time stated in the declaration the plaintiff was engaged in the business of, etc., and that the defendant, in a conversation with the plaintiff, in the presence and hearing of other persons, and within (*one year*) before the commencement of this suit, said to the plaintiff, "You have put your property out of your hands," etc., and that these words were spoken without qualification by other language or circumstances, showing that the defendant did not intend the natural and ordinary meaning of the words used, then the jury should find the defendant guilty, and assess the plaintiff's damages at what they deem to be right and proper under the evidence.

Words spoken of another which, in their common acceptance, charge him with selling or disposing of his property with an intent to defraud, hinder or delay his creditors of their just debts, are actionable in themselves without showing special damage arising therefrom. The law will imply both malice and damage from the speaking of such words, if the jury believe, from the evidence that such words were spoken, as charged in the declaration.

§ 8. *Charge of Arson by Innuendo.*—The court instructs the jury, that if they believe, from the evidence, that before the time when the slanderous words are charged to have been spoken, the defendant's dwelling house had been burned, and that afterwards, and within (*one year*) before the commencement of this suit, the defendant, in the presence and hearing of third persons, spoke the words, "She burned my house up," or the words, "I have got rid of my old house burner," or the words, "She is an old house burner;" and if the jury further believe, from the evidence, that in the speaking of said words, the defendant intended to convey the idea and to charge that the plaintiff had willfully and feloniously burned the said

house of defendant, and that the persons hearing the language so understood him, then the speaking of such words would be slanderous, and the jury should find the defendant guilty.

§ 9. **Charge of Murder, by Innuendo.**—If the jury believe, from the evidence, that the defendant, within (*one year*) before the commencement of this suit, in speaking of and concerning the plaintiff, spoke the words, "She killed my father," in the presence and hearing of third persons; and further, that in speaking these words, the defendant intended to charge the plaintiff with having willfully and feloniously caused the death of defendant's father, then such words were slanderous, and the jury should find for the plaintiff.

§ 10. **Words Must be Proved as Charged.**—The jury are instructed, that to entitle the plaintiff to recover in this suit, he must prove the speaking of the words alleged in the declaration; other words of like meaning, or equivalent words or expressions, will not suffice.

Though the jury may believe, from the evidence, that the defendant spoke words which are equivalent to the words charged in the declaration, and which convey the same meaning, still, if the jury further believe, from the evidence, that the words proved are not, substantially, the same words as those charged in the declaration, then the plaintiff is not entitled to recover. *Flinn vs. Barow*, 16 Ill., 39.

The plaintiff is not entitled to recover upon the proof of the speaking of words which are only similar to, or have the same meaning as, the words charged in the declaration, but are not the same words. She can only recover upon proving the speaking of the material words of some one or more of the slanderous statements charged in the declaration, precisely as therein charged. *Wallace vs. Dixon*, 82 Ill., 202.

The burden of proof in this case is upon the plaintiff, and to entitle her to recover, it is incumbent on her to prove, by a preponderance of all the evidence, that the defendant spoke of and concerning the plaintiff the slanderous charges, or some one or more of the slanderous charges, contained in her declaration, in the precise words and language in which they are therein set forth.

And if the jury believe, from all the evidence in the case, that the plaintiff has failed to establish the speaking of such words, by a preponderance of all the evidence, then the jury should find the defendant not guilty.

Proof of the speaking of the following words (*any words different from those charged in the declaration*)—if the jury find, from the evidence, that the speaking of such words has been proven—does not prove any of the charges laid in the declaration in this case.

In an action for slander, so many of the words complained of must be proved as will establish the slander, in the precise words charged in the declaration; other words of similar import, or equivalent words, if proved, will not sustain the action.

§ 11. **Words not Spoken Maliciously.**—The jury are instructed, that to constitute slander, it is not necessary that a person should intend to make a false charge; the real test is, did the speaker intend by the words used, to make the charge alleged in the declaration, did the hearers understand that he so intended, and was the charge false? *Shull vs. Raymond*, 23 Minn., 66.

An action for slander will not lie, for words spoken under such circumstances as would lead persons present to believe that they were not spoken as truth, and were not intended by the speaker, or understood by the hearers, as intended to convey the charge complained of in the declaration; and in this case, though the jury may believe, from the evidence, that the defendant did speak the slanderous words charged in the declaration, still if the jury further believe, from the evidence, and the facts and circumstances proved on the trial, that the defendant did not intend to impute, and the hearers did not understand him to impute, to the plaintiff, the offense which the words might, under other circumstances, naturally import, then the jury should find the defendant not guilty.

Though the jury may believe, from the evidence, that the slanderous words were spoken as alleged in plaintiff's declaration, still, if the jury further believe, from the evidence, that the words were not spoken maliciously, and that the character of the plaintiff has not been injured thereby, then the jury are

at liberty to bring in a verdict for the plaintiff for nominal damages only.

If the jury believe, from the evidence, that the defendant in speaking the words charged, was not actuated by malice, but simply repeated them as something he had heard from others, and without any malice towards the plaintiff, and did not intend to be understood as imputing any offense to her, then the jury should find for the defendant. And it is a question for the jury to determine from all the facts and circumstances proved, and from all the evidence in the case, whether the defendant did thus repeat the words, and whether he acted maliciously in so doing. *Cumnerford vs. McAvoy*, 15 Ill., 311.

§ 12. **Anger no Justification.**—The court instructs the jury, that anger is not a justification for the use of slanderous words, and it ought not to be considered, even in mitigation of damages, unless the anger is provoked by the very person against whom the slanderous words are used. *Janch vs. Janch*, 50 Ind., 135.

In this case, if the jury believe, from the evidence, that the defendant spoke of the plaintiff, any of the slanderous words charged in the declaration, then it matters not who commenced the conversation, or that the defendant was angry at the time, unless his anger was wrongfully provoked, in whole or in part, by the acts or language of the plaintiff herself.

If the jury believe, from the evidence, that the defendant spoke in the presence and hearing of others, of and concerning the plaintiff, the slanderous words charged in the declaration, then it is immaterial whether the words were uttered with or without anger or passion on the part of the defendant, unless the jury further believe, from the evidence, that such passion was wrongfully caused or provoked by the plaintiff; and even in such case, anger or passion would be no justification, it could only be considered by the jury in mitigation of damages, in case they find the plea of justification not established by a preponderance of testimony, and find the defendant guilty. *Balt vs. Budwig*, 28 N. W. Rep., 282.

§ 13. **Anger in Mitigation, When.**—The jury are instructed, that while it is true, that anger or passion is not a justification

for the use of slanderous words, or even a mitigating circumstance, unless provoked by the person against whom the slanderous words are spoken, yet, if the party complaining does wrongfully provoke such anger, the fact may be taken into account and considered by the jury in fixing the amount of their verdict, in case they find the defendant guilty. *Freeman vs. Tinsley*, 50 Ill., 494; *McClintock vs. Crick*, 4 Ia., 453.

Though the jury may believe, from the evidence, that some of the slanderous words, charged in the declaration, were uttered by the defendant, as charged, still, if the jury further believe, from the evidence, that the words were spoken in the heat of passion, during a quarrel between the defendant on one side, and the plaintiff and one A. B. on the other, and that in the course of such altercation, the said A. B. and the said plaintiff, without cause or provocation on the part of the defendant, used violent and abusive language against the defendant, and called him vile names, calculated to provoke the passions, and that the slanderous words were used by defendant while laboring under excitement and passion, caused by such abuse, then, while it is true that these facts do not constitute a defense to the action, if proved, they are proper to be taken into consideration by the jury as mitigating circumstances on behalf of the defendant.

§ 14. **Slanderous Words Explained.**—Although the jury may believe, from the evidence, that the defendant, in speaking of the plaintiff, upon the occasion referred to by the witnesses, did say ("You are a thief, you stole my corn"); still, if the jury further believe, from the evidence, that he accompanied that charge with such explanations as would show to the bystanders, who heard the conversation, that he only meant to charge the defendant with a trespass, and not with a crime of larceny, then, so far as that charge is concerned, the jury should find for the defendant. *Mitchell vs. Strong*, 17 Ill., 597.

Though the jury may believe, from the evidence, that the defendant did speak some of the slanderous words complained of, still, if the jury further believe, from the evidence, that the defendant in the same conversation, and in presence of the

same persons, voluntarily and in good faith, recalled or took back the slanderous language, or qualified such slanderous words, so that the persons present would clearly understand, from the whole conversation, that the offense of (*larceny*) was not imputed or charged upon the plaintiff, then such slanderous words will not afford the plaintiff any ground of action in this case.

PLEA OF JUSTIFICATION FILED.

§ 15. **All the Words Need not be Proved.**—The court instructs the jury that the plaintiff is not bound to prove the speaking of all the words charged in the declaration; if the jury believe, from the evidence, that the defendant spoke of and concerning the plaintiff, in the presence of others, any of the slanderous words charged in the declaration, the fair import of which would be to charge the plaintiff with the crime of (*larceny*), then he is entitled to a verdict, unless the defendant has established the truth of his plea of justification, by the evidence, in the minds of the jury, beyond any reasonable doubt (*or by a preponderance of the evidence*).

§ 16. **Plea of Justification, How Proved.**—The court instructs the jury, as a matter of law, that where a plea of justification, in an action for slander, accuses the plaintiff of a crime, the defendant, in order to sustain the plea, must prove the guilt of the plaintiff, as charged in the plea, beyond a reasonable doubt. So far as the degree of proof is concerned, the plaintiff occupies the same position as if he were on trial upon an indictment for the offense charged. *Merk vs. Gelzhaenser*, 50 Cal., 631; *Corbley vs. Wilson*, 71 Ill., 209.

The court instructs the jury, that, in this case, the plea of justification alleges that the plaintiff was guilty of the crime of (*perjury*), and to prove the truth of that plea, it is incumbent upon the defendant to prove everything requisite to constitute the crime of (*perjury*) beyond a reasonable doubt. *Barton vs. Thompson*, 46 Ia., 30; *Mott vs. Dawson*, 46 Ia., 523.

The court further instructs the jury, as a matter of law, that in order to sustain his plea of justification, in this case, it is incumbent upon the defendant to prove, to the satisfaction

of the jury, beyond all reasonable doubt, that the plaintiff was guilty of the crime of (*perjury*), as alleged in said plea.

Among the other things necessary for the defendant to prove, to the satisfaction of the jury, in order to maintain the plea of justification, in this case, is the fact that the plaintiff, before he testified as a witness in the case of *E. vs. S.*, referred to by the witnesses, was sworn to testify to the truth, the whole truth and nothing but the truth, by some officer authorized by law to administer the oath. And if the jury find, from the evidence, that the defendant has failed to prove that fact upon this trial, beyond a reasonable doubt, then, as a matter of law, the justification is not made out.

Contra: The court instructs the jury, that if they believe, from the evidence, that the plaintiff was guilty of the crime of (*perjury*), in manner and form as charged in the plea of justification, filed in this case, then the jury should find for the defendant.

In order to sustain the plea of justification, it is not necessary that the defendant should establish the truth of that plea beyond a reasonable doubt; it is sufficient if it is established by a preponderance of the evidence. Cooley on Torts, 208; *Elliott vs. Van Buren*, 33 Mich., 49; *Blaeser vs. Milwaukee, etc.*, 37 Wis., 31; *Knowles vs. Scribner*, 57 Me., 495; *Rothschild vs. Am. Cent. Ins. Co.*, 62 Mo., 356; *Burr vs. Wilson*, 22 Minn., 206; *Jones vs. Graves*, 26 Ohio St., 2.

The jury are further instructed, that though they believe, from the evidence, that the plaintiff did testify, on the trial of *E. vs. S.*, that the trees in question were on the north side of the hedge, that fact will not be sufficient to maintain the defendant's plea of justification, unless the jury further believe, from the evidence, that the question of the location of said trees, with reference to said hedge, was a material question in the trial of said cause; and, also, that the plaintiff knowingly and willfully testified to what he knew to be untrue in that particular.

If the jury believe, from the evidence, that the plaintiff was called as a witness in the case of *E. vs. S.*, and that, before testifying, he has sworn by (*some officer authorized to administer oaths*) to tell the truth, the whole truth and nothing but the truth, and that upon said trial the said plaintiff know-

ingly, willfully and falsely testified that the trees in question were on the south side of a hedge, and that the question of the location of said trees, in reference to said hedge, was a material question on the trial of said cause, then the defense of justification is made out, and the jury should find for the defendant.

The court further instructs the jury, that if they believe, from the evidence, that the plaintiff was sworn by, etc., to tell the truth, the whole truth and nothing but the truth, and that he swore to the statements set forth in the defendant's plea of justification, and that in so swearing he knowingly and willfully swore to what was not true, and that such testimony was material upon the trial of the suit of *E. vs. S.*, then, and in that case, the defendant would be justified in telling the plaintiff that he swore falsely on that trial, or that he swore to a lie on that trial.

§ 17. **When the Plea Does not Impute Crime.**—The court instructs the jury, that it is sufficient for the defendant to establish his plea of justification by a preponderance of evidence; and if the jury believe, from the evidence, that the defendant's plea of justification, in this case, has been proved by a preponderance of evidence, the jury should find the defendant not guilty, although they find that the defendant spoke the words alleged. The law does not require the truth of such a plea to be established beyond a reasonable doubt.

If the jury believe, from the evidence, that the defendant spoke and published of and concerning the plaintiff the alleged slanderous words, in manner and form as charged in the declaration, then the jury should find the defendant guilty, unless they further find, from the evidence, that the defense of justification, set up in the defendant's plea, has been established on this trial, by a preponderance of the evidence.

The court further instructs the jury, that if they believe, from the evidence, that the defendant spoke and published of and concerning the plaintiff the slanderous words charged in plaintiff's declaration, in manner and form as therein stated, then the law will imply malice and a consequent injury, unless the jury further find that the defense of justification has been established by a preponderance of evidence.

§ 18. **Plea of Justification in Good Faith.**—The court instructs the jury, that, although they should find, from the evidence, that the defendant in this case has not sustained his plea of justification, still, the fact that he has filed such plea must not of itself be regarded by the jury as evidence of malice on the part of the defendant. *Harover vs. Harover* 78 Ill., 412.

The court instructs the jury, that if they believe, from the evidence, that the proof offered by defendant to sustain his plea of justification, tended to prove said plea, then they should consider that circumstance in arriving at their conclusion, as to whether the said plea was filed in good faith by the defendant, and with the belief that he could sustain the same by evidence.

§ 19. **Office of the Plea of Justification.**—The court instructs the jury, that in this state a defendant has a right to file as many pleas as he deems necessary for his defense, and it is no objection that the pleas are inconsistent with each other; each plea stands by itself and forms a distinct issue.

And in this case, the fact that defendant has filed a plea justifying the speaking of the words charged, does not relieve the plaintiff from the necessity of proving the speaking of the words alleged. The plea of justification cannot be used to convict the defendant; he is not bound to make his defense till there is evidence showing his guilt. *Furnam vs. Childs*, 56 Ill., 544.

§ 20. **Repeating Report.**—If the jury believe, from the evidence, that the defendant is guilty of speaking the slanderous words charged in the declaration, then the fact, if proved, that defendant gave the statement as a report in the neighborhood, and mentioned his authority for the statement, would not exonerate him from liability. *Fowler vs. Chichester*, 26 Ohio St., 9.

The jury are instructed, that, although they may believe, from the evidence, that the defendant spoke the slanderous words, charged in the declaration, of and concerning the plaintiff, yet, if the jury further believe, from the evidence, that the defendant did not originate the slander, that he merely reported what some one else had said to him, or in his presence,

and that he acted without malice in repeating it, and that the plaintiff was, in reality, in no manner injured by the slander, then the jury may give nominal damages only.

LIBEL.

§ 21. **Libel Defined.**—The court instructs the jury, as a matter of law, that a libel may be defined to be a malicious defamation, expressed either by printing, writing, or by signs or pictures tending to blacken the memory of one who is dead, or to impeach the integrity, honesty, virtue or reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or pecuniary injury.

That every publication by writing or printing, which falsely charges upon, or imputes to any one a crime which renders him liable to punishment, or which alleges against him, that which is calculated to make him infamous, odious or ridiculous in public estimation, is *prima facie* a libel, and malice is implied from the publication against the publisher thereof.

The jury are instructed, that conductors and publishers of newspapers are not privileged to publish libel in the dissemination of news, but are liable for libelous publications, like other persons, without proof of express malice or actual ill-will against the person libeled.

§ 22. **Malice Defined.**—Malice, or the term malicious, used in the statute defining libel, means a wrongful act done intentionally without just cause or excuse, and the law presumes a malicious motive for making a charge which is false and injurious, when no justifiable motive appears. There is also malice in fact, that is, an actual, spiteful, malignant or revengeful disposition, or ill-will against another. If the jury believe, from the evidence, that the defendant published, etc., and that the publication was injurious in itself and without excuse or justification, as explained in the instructions upon that point, then the law implies malice; and if there was actual intention in the publication to injure the plaintiff, then there was malice in fact, if there was no lawful justification.

Any unlawful act done willfully to the injury of another is, as against that person, malicious, and it is not necessary that

the doer of such act should have ill-will or pursue any general bad designs, in order to make him liable for such unlawful acts; and in order to constitute malice in the publisher of a libel, it is not necessary that the publisher should have personal ill-will towards the person libeled, and an article published against one in a newspaper, if false and defamatory, is actionable, though the editor believed it to be true, and acted in good faith; and the law will imply malice from the publication of such false and defamatory article.

§ 23. **Damages Presumed, When.**—That language published about any one, imputing an indictable offense, or fraud or swindling or dishonesty in a particular transaction, or want of integrity, is actionable without proof of special damage, and damage is presumed in such case. If, therefore, the jury believe, from the evidence, that the defendant published of and concerning the plaintiff the language alleged in the declaration, at the time alleged, and that such language imputed to said plaintiff the offense or charge of dishonesty, swindling or of fraud, and that the plaintiff suffered injury by reason of said publication in his person, reputation, feelings or business, and that no excuse or justification, as explained in these instructions, has been shown in evidence, then the jury could find the defendant guilty.

The law implies damages from the publication of libelous words, without special proof of damages, and it also implies that the person who publishes the libel, intends the injury which the libel is calculated to produce.

If, therefore, the jury find, from the evidence, that the defendant published the libel, or libels, charged in the declaration, and that they were calculated to injure the plaintiff, by exposing him to ridicule and contempt, shame or disgrace, or to injuriously affect his reputation in the community, as to honesty and integrity, then, unless justification is proved, the jury ought to find the defendant "guilty."

§ 24. **Plea of Justification Filed.**—If the jury believe, from the evidence, that the defendant published the libel, as charged in plaintiff's declaration, and that he has failed to show, by a preponderance of evidence, the truth of the charges made

against the plaintiff, in the plea of justification, then the jury should find a verdict for plaintiff, and assess his damages at such a sum as the jury believe, from the evidence, the plaintiff ought to recover, not exceeding the amount claimed in the declaration.

The court instructs the jury, that if they believe, from the evidence, that plaintiff has proved the publication, as charged in his declaration, and that defendant has failed to prove, by a preponderance of evidence, the truth of the plea of justification, as pleaded by him, then, and in such case, the jury should render their verdict in favor of the plaintiff for such an amount as they should believe, from the evidence, he is entitled to recover.

If you believe, from the evidence, that the defendant composed and published the printed article in plaintiff's declaration mentioned and set out, as therein stated, then the jury should find the defendant guilty, unless they further believe, from the evidence, that the charges, statements and insinuations in said printed article are true, as stated in defendant's plea.

§ 25. **Malice Presumed. When.**—If the jury believe, from the evidence, that defendant published the libel of and concerning the plaintiff, as charged in plaintiff's declaration, then the law presumes malice on the part of the defendant against the plaintiff, and it rests upon the defendant to rebut this presumption of malice, and if he has not done so, by a preponderance of evidence, then the jury should find for the plaintiff, unless they believe, from the evidence, the truth of the facts stated in the plea of justification, filed by defendant.

§ 26. **How the Words Are to be Understood.**—That the words alleged to be libelous are to be taken in the sense that is most natural and obvious, and in that sense in which those persons to whom the publication should come, would be most likely to understand them. It is not necessary that the words published should charge any specific crime or act of dishonesty in direct terms, but if the necessary inference to be drawn from the language used, is a charge of an indictable offense or an act of dishonesty, taking the words in their usual and ordinary meaning, then they are actionable.

That where a person receives information, which, if true, is injurious to the character of another, he is not justified in publishing that information to the prejudice of that other person, merely because he believes it to be true or because he is ignorant of its truth or falsity.

It is for the jury to determine, from the evidence, what is the meaning of the words which are charged to have been published of the plaintiff; they are to be construed in their plain and ordinary sense, and are to be taken to mean what persons of ordinary intelligence would reasonably take them to mean.

The declaration alleges, in the first count, that the words alleged meant that plaintiff, for several months, had wrongfully, fraudulently and dishonestly, and with intent to cheat, refused to pay rent to B. In order to sustain the defense of a justification under this count, the jury must be satisfied, from the evidence, that plaintiff's refusal or omission to pay rent due, if there was such refusal and such rent due, was wrongful, fraudulent, dishonest and with intent to cheat B. out of the rent.

In the second count of the declaration it is alleged that the words mentioned meant to charge that plaintiff, as a tenant, was dishonest, and was one who would cheat and defraud a landlord. This relates to plaintiff's character as a tenant, and, in order to justify the charge imputed in these words, the jury must be satisfied from the evidence, that, in respect to plaintiff's dealings with B. in the matter of the tenancy, plaintiff is shown to have been dishonest and intending to cheat and defraud B., as his landlord.

§ 27. **Plea of Justification an Aggravation of Damages, When.**—If the jury believe, from the evidence, that the plea of justification in this case was not filed in good faith, and with an honest expectation that the same could be proved, but was resorted to for the purpose of injuring the plaintiff, then, if the jury find defendant guilty, they may regard the plea of justification as an aggravation of the original offense.

If the defendant, in this case, is found guilty of publishing the libels, and that they have the meaning imputed to the words in the declaration, and the attempted justification by

the defendant is not made out, the jury have the right to consider, from the evidence, whether the justification was attempted in good faith, with an honorable intention and expectation of proving its truth, and if the jury find, from the evidence, that it was not so pleaded, then the attempted justification amounts to a republication of the libel, and is an aggravation of the damages.

§ 28. **Not an Aggravation of Damages, When.**—The jury are instructed, that when a plea of justification of libelous publications is filed in good faith, and with an honest expectation that the same can be proved, and evidence is introduced honestly, for the purpose of supporting it, such evidence may be considered by the jury in mitigation of damages, even though it be insufficient to prove the truth of the plea.

The filing of a plea of justification in this case does not necessarily aggravate the damages, even though the jury find that it has not been proved; provided, the jury further believe, from the evidence, that defendant filed such plea, believing in good faith that it was true, and that he could prove it. *Thomas vs. Dunaway*, 30 Ill., 373.

§ 29. **Mitigation of Damages.**—In the event that the jury do not find the plea of justification to be true, but do find the defendant guilty, then the jury, in estimating the amount of plaintiff's damages, may properly take into consideration such facts, if any are proven, as may tend to show whether or not the publication complained of was made by defendant in a *bona fide* belief that the publication was true.

And the jury may also take into consideration, in the estimation of damages, any acts of the plaintiff connected with the publication complained of, if any such are proven, which were calculated to provoke the publication.

§ 30. **No Plea of Justification Filed.**—If the jury believe, from the evidence, that the defendant published the libel, as charged in the declaration, then the plaintiff is entitled to recover in this suit.

The court instructs the jury, that the evidence offered by the defendant, in regard to plaintiff's general character, is evi-

dence, not in justification of the alleged libel, but in excuse or extenuation, and for the purpose of diminishing the amount of plaintiff's damages. If the plaintiff has proved the publication of the libel, as alleged, then he is entitled to a verdict, and the amount of his damages, if any, is to be determined by all the evidence in the case.

§ 31. **General Issue Impliedly Admits, etc.**—In this case, the defendants, by their plea of not guilty, admit that the plaintiff is not guilty of the charge alleged in the libel, as set out in the declaration.

The jury are instructed, that all the evidence admitted regarding the plaintiff's general character, and the existence of reports and rumors affecting it, was not received for the purpose of showing the plaintiff guilty of the matters referred to, his innocence being admitted by the defendant's plea of not guilty; this evidence was received in excuse and in mitigation of the plaintiff's damages, and for no other purpose.

CHAPTER XLII.

TENDER.

- Sec. 1. What constitutes a valid tender.
2. Burden of proof.
 3. Tender as a gift or present.
 4. On condition of receipt in full.
 5. Willingness to pay but no tender.
 6. Acceptance of tender.
 7. Specifying objections to acceptance, a waiver, etc.
 8. Express waiver of production of the money.
 9. Tender must be kept good.
 10. Tender after suit brought.
 11. Tender waived.

§ 1. **What Constitutes a Valid Tender.**—As regards the plea of tender filed in this case, the court instructs the jury, that to constitute good tender of any amount of money, it is necessary for the party indebted, absolutely and unconditionally, to offer to pay to the other party the amount tendered in current money, such as is made a legal tender by law, and actually offer the money at the time the tender is claimed to have been made by producing the money and showing it to the person to whom the money is due, unless such person waives the performance of, or compliance with, some or all of these conditions. 3 Greenlf. Ev., § 601, 602; *Rose vs. Duncan*, 49 Ind., 269; *Cothran vs. Scanlan*, 34 Ga., 555; *Hunter vs. Warner*, 1 Wis., 141; *Post vs. Springstead*, 49 Mich., 90.

The court further instructs the jury, that to have a tender of any avail, the amount tendered must be the precise sum, or more than the amount due, and the tender must be kept good by bringing the money tendered into court and depositing it for the benefit of the plaintiff. Pars. on N. & B., 621; *Henly vs. Streater*, 5 Ind., 207; *Pillsbury vs. Willoughby*, 61 Me., 274.

The jury are instructed, as a matter of law, that in order to constitute a valid tender, the money must be offered to, and

exhibited in view of, the person to whom the tender is to be made, unless it appears, from a preponderance of the evidence, that such person, by his conduct or words, prevented the tender or excused the exhibition of the money in his sight. *Dickinson vs. Hayes*, 1 N. W. Rep., 834; *Guthman vs. Kearns*, 8 Neb., 502; *Pinney vs. Jorgensen*, 27 Minn., 26; *Hoffman vs. Van Dieman*, 62 Wis., 362.

Although the jury may believe, from the evidence, that before this suit was brought the defendant tendered to the plaintiff the sum of \$——, still such tender cannot avail him here, unless the jury further believe, from the evidence, that the defendant has kept that tender good by bringing the money into this court for the use of the plaintiff. *Aulgee vs. Clay*, 109 Ill., 487.

To constitute a good and sufficient tender, the debtor must offer to pay and tender to the creditor the precise amount which he intends to pay and allow the creditor to keep; he cannot offer the creditor more than he admits is due or intends to pay, and require the creditor to make change, and after taking out the amount tendered to himself pay over the balance to the debtor.

§ 2. **Burden of Proof.**—Upon the question of tender, the court instructs the jury, that the burden of proof is upon the defendant, and to entitle him to a verdict upon that issue, it must appear, by a preponderance of the evidence, that the defendant, before the commencement of the suit, unconditionally offered to pay to the plaintiff a certain definite sum in legal tender money; that the money was actually produced and shown to the plaintiff; that the amount so tendered was offered in payment of the debts and demands sued on in this case, or in such a way as to cover these demands, and that the amount offered was equal to the amount due upon the claims upon which the tender was made; and, further, that the tender has been kept good by the payment of the amount so tendered into court for the plaintiff; unless the jury find, from the evidence and under the instructions of the court, that some one or more of these requisites of a good tender have been waived or dispensed with by the plaintiff, as explained in these instructions. *Pulsifer vs. Shepard*, 36 Ill., 513.

§ 3. **Tender as a Gift or Present.**—Though the jury may believe, from the evidence, that upon the occasion referred to by the witnesses, the defendant did produce, count out and actually offer to the plaintiff the sum of \$——, still, if the jury further believe, from the evidence, that such offer was accompanied by the statements, on the part of the defendant, that he owed the plaintiff nothing, that he would make him a present of that amount of money, etc. (*any words denying the indebtedness, but offering a bonus*), then this would not constitute a tender of any amount upon the demands involved in this suit; and if the jury further find, from the evidence, that no other tender has been made by the defendant, then, upon the question of tender, the jury should find for the plaintiff, even though the jury believe, from the evidence, that the defendant has attempted to keep such alleged tender good by paying the money into court. 2 Greenlf. Ev., § 605; *Simmons vs. Wilmott*, 3 Esp., 94.

§ 4. **On Condition of Receipt in Full, etc.**—Though the jury may believe, from the evidence, that on the occasion referred to by the witnesses, the defendant actually tendered to the plaintiff the sum of \$——, in payment of the demand sued on in this case, and that that sum was all or more than was then due thereon, still, if the jury further believe, from the evidence, that that tender or offer of payment was coupled with or made only upon the condition that the plaintiff should give the defendant a receipt in full of all demands, then this was a condition which the defendant had no right to impose upon the plaintiff upon such tender, and such a tender cannot avail the defendant anything in this suit. 2 Greenlf. Ev., § 605; *Wood vs. Hitchcock*, 20 Wend., 47; *Sutton vs. Hawkins*, 8 C. & P., 259; 2 Pars. on N. & B., 625.

§ 5. **Willingness to Pay, but no Tender.**—That a mere expression of a willingness or a readiness to pay, or a proposition to pay, whatever is due, without specifying any certain sum, and without actually producing and offering some definite sum of money, does not constitute a valid tender. To constitute a good and sufficient tender, the person indebted must offer to pay a definite, certain sum of money, and he must specify upon

what demands he proposes to pay it, whether upon any particular indebtedness, or in payment of all that is due from him to the party to whom the tender is made, unless the jury believe, from the evidence, that the actual production of the money was dispensed with, or waived by the creditor. *Eastman vs. Rapids*, 21 Ia., 570; *Steele vs. Briggs*, 22 Ill., 643.

Though the jury may believe, from the evidence, that some time about, etc., the parties met and had a conversation about the matters in controversy in this suit, and that in that conversation, defendant told the plaintiff that he was ready to pay him whatever was due, that he had the money in his pocket, and if the plaintiff would name the sum he would pay him, still, this would not amount to a valid tender. It should further appear, from a preponderance of the evidence, that the defendant offered to pay some certain, definite sum, and that he then actually produced the money in view of the plaintiff, unless the plaintiff in some manner, by act or words, dispensed with the production of the money.

§ 6. **Acceptance of Tender.**—The court instructs the jury, as a matter of law, that if a party tender to another a certain sum of money, in full satisfaction and discharge of a disputed claim, and the other party receive it on the terms proposed, it will constitute a perpetual bar to any further recovery on the same account. *Jenks vs. Burr*, 56 Ill., 451; *Colter vs. O'Connell*, 48 Ia., 552.

The jury are instructed, that the law is, that where money is offered by one person to another, in satisfaction of a disputed claim, and the offer be accompanied by such acts and declarations as amount to a condition that if the money is accepted, it must be accepted in full satisfaction of the claim, then the party to whom it is offered, is bound to understand, that if he takes the money, he takes it subject to the conditions upon which it is offered; if he does not intend to take the money on those conditions, he must not take it at all. *Preston vs. Grant*, 34 Vt., 201.

And in this case, if the jury believe, from the evidence, that before the commencement of this suit, in an interview between plaintiff and defendant, the defendant offered and proposed to pay the plaintiff \$——, upon condition that he would ac-

cept the same in full payment of the demand sued for in this suit, and that he would pay the money upon no other condition, claiming that he owed the plaintiff no more than that sum, and if the jury further believe, from the evidence, that the plaintiff accepted, and took the money under that offer, then he must be deemed to have taken the money in full payment and full satisfaction of such demands, no matter what protests or objections to so receiving the money he may have made at the time.

§ 7. **Specifying Objection to Acceptance, a Waiver, etc.**—The court instructs the jury, that the law is, that when one person makes a tender to another, and the tender is not accepted, and the person to whom the tender is made, places his refusal to receive the tender upon certain specified objections, such, for instance, as that the amount tendered was insufficient, he cannot, after suit is brought, raise other objections which might have been easily remedied at the time, if they had been made then. *Stokes vs. Recknagel*, 38 N. Y. Sup. Ct., 368; *Whelan vs. Reilley*, 61 Mo., 565.

The jury are instructed, as a matter of law, that when one undertakes to make a tender, and the other party refuses to receive the amount proffered on the ground of its insufficiency, and makes no other objection, this will be a waiver of any informalities in the mode or manner of making the tender. *Whelan vs. Reilley*, 61 Mo., 565.

If the jury believe, from the evidence, that the plaintiffs were the owners of the property in question, and that the defendants had the same, claiming a lien thereon, for (*freight etc.*), and that they refused to deliver up the goods unless the plaintiffs would pay them an amount larger than the jury believe, from the evidence, they were entitled to demand, and so told the plaintiffs or their agent, then no tender of any amount was necessary; provided, the jury believe, from the evidence, that the plaintiffs were ready and offered to pay the amount that was actually due.

§ 8. **Express Waiver of Production of the Money.**—If the jury believe, from the evidence, that at some time before the commencement of this suit, the plaintiff and defendant met and

talked over the matter of the claims sued on in this case, and, that upon that occasion, the defendant offered to pay to the plaintiff \$——, or any other certain sum, in payment of the demand in question in this suit, and, at the same time, put his hand in his pocket for the purpose of taking out the money so offered, and that the plaintiff then said to him, that he need not take out his money, that he would not accept any such sum, or words to that effect, then this would amount to a waiver of the necessity, on the part of the defendant, of actually producing, exhibiting and offering the money to the plaintiff. *Guthman vs. Kearn*, 8 Neb., 502.

§ 9. **Tender Kept Good.**—If the jury believe, from the evidence, that prior to the commencement of this suit, the defendant tendered to the plaintiff, or to the person authorized by him to collect the account sued on in this suit, the sum of \$——, and that that was the full amount of what was then due to the plaintiff, and that the defendant afterwards, at the trial before the justice, paid that amount into the hands of the justice, and left it with him to be paid to the plaintiff, or to be brought into this court on appeal, if an appeal should be taken, and that the same was sent by the justice to this court upon the appeal, and has since remained here, subject to the order of the plaintiff, these facts constitute a good tender, and upon that issue the jury should find for the defendant. *Aulger vs. Clay*, 109 Ill., 487.

If the jury believe, from the evidence, that before the commencement of this suit the defendant made a tender of \$—— in payment of the demand sued upon, and that he has kept that tender good, as explained in the former instructions in this case, then, to entitle the plaintiff to recover, he must show, by a preponderance of evidence, that at the time of such tender there was more than \$—— due to him; and unless he has done so, the jury must find the issue of tender in favor of the defendant.

§ 10. **Tender after Suit Brought.**—If the jury believe, from the evidence, that some time on, or about, etc., and since the commencement of this suit, the defendant, by his attorney, tendered to the plaintiff in payment of the demands now in

question, the sum of \$——— for such debts and the costs incurred in the suit up to that time; and further, that at that time there was no more than the said sum of \$——— due to the plaintiff including such costs; and further, that the defendant has kept that tender good by paying the said sum of \$——— into this court for the use of the plaintiff, then, upon the question of tender, the jury should find a verdict for the defendant. *Barnes vs. Greene*, 30 Ia., 114.

§ 11. **Tender Waived.**—When a person declares there is nothing due him when an offer is made to pay him an alleged claim, he thereby excuses any formal tender, and he cannot afterwards object that the money was not counted out and presented to him. *Lacy vs. Wilson*, 24 Mich., 479.

A tender regularly and lawfully made discharges a lien, and while the debt is not discharged thereby, yet the security is destroyed at once. *Eslow vs. Mitchell*, 26 Mich., 500.

CHAPTER XLIII.

TRESPASS.

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INJURIES TO THE PERSON.

§ 1. **Assault Defined.**—The court instructs the jury, that every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person—a right to live in society without being unnecessarily or wrongfully put in fear of personal harm; and an assault is an attempt with unlawful force to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Cooley on Torts, 160; *Harrison vs. Ely*, 120 Ill., 83.

Whoever attempts to strike, touch or do any violence to another, however small, in a wanton, willful, angry or insulting manner, having an intention and an apparent present ability to do some violence to such person, is guilty of an assault.

§ 2. **Assault and Battery Defined.**—The jury are instructed, that an assault and battery consists in an injury actually done

to the person of another in an angry or revengeful, rude or insolent manner. Any unlawful beating of another, however slight, is an assault and battery; and the degree of bodily pain and injury, if the assault and battery are proved, is only important as affecting the measure of damages. Cooley on Torts, 162; *Harrison vs. Ely*, 120 Ill., 83.

If the jury believe, from the evidence, that the defendant some time on, or about, etc., struck and kicked the plaintiff, as alleged in plaintiff's declaration, without any sufficient provocation therefor, as explained in these instructions, and that the plaintiff was injured by such striking and kicking, and has suffered any damage therefrom, then the jury should find the issues for the plaintiff.

The court further instructs the jury, that if they believe, from the evidence, that the defendant assaulted and beat the plaintiff, as charged in the declaration, then they should find a verdict for the plaintiff, unless they further believe, from the evidence, that such assaulting and beating, when done, were reasonably and apparently necessary in defense, etc., and that the force and violence used by the defendant were no more than a reasonable man would have deemed reasonably necessary in such defense.

§ 3. **Plaintiff's First Assault—Plea of General Issue Only.**—The jury are instructed, that under the pleadings in this case, even if you find the plaintiff made the first assault, that fact cannot be considered by the jury as a justification of the conduct of the defendants, if you find, from the evidence, that they, or either of them, also made an assault upon the plaintiff. In such case, the plaintiff's first assault can only be considered in mitigation of damages.

Under the pleadings in this case, the only question for the jury to determine is, whether the defendants, or either of them, committed an assault and battery upon the person of the plaintiff, as charged in the declaration; and if you find, from the evidence, that the defendants, or either of them, committed the assault and battery complained of, it cannot be claimed, as a justification for such assault by the defendant or defendants, that the plaintiff made the first assault. 1 Chitty on Plead., 501; 2 Greenl. Ev., § 95.

§ 4. *Aiding, Abetting, etc.*—The court instructs the jury, that a person who encourages, advises, aids, or abets an unlawful assault and battery, is liable for all the damages directly resulting therefrom. And in this case, if the jury believe, from the evidence, that the defendant, A. B., unlawfully assaulted and injured the plaintiff, as alleged in the declaration, then, if the jury further believe, from the evidence, that the other defendants, or either of them, aided, abetted, advised, or encouraged such assault, by the said A. B., the jury should not only find the said A. B. guilty, but they should also find such of the other defendants guilty as they believe, from the evidence, aided, abetted, advised, or encouraged the commission of such assault.

If several persons commit an unlawful assault and battery upon the person of another, then each person who participates in such assault is guilty, and liable to the party injured for all the damage he may sustain in consequence of such assault.

And if any one incites, advises, or encourages an unlawful assault and battery, then he is also liable as principal, and to the same extent as though he had actually participated in committing the assault, and inflicting the injury. Cooley on Torts, 125, 133; *Barden vs. Felch*, 109 Mass., 154; 2 Hill. on Torts, 293.

When several persons unite in an act which constitutes a wrong to another, intending at the time to commit the act, or do it under circumstances which fairly show that they intended the consequences which followed, then the law will compel each to bear the responsibility of the misconduct of all, and the party injured is at liberty to enforce his remedy against all, or against any one or more of the number. *Page vs. Freeman*, 19 Mo., 421; *Wright vs. Lathrop*, 2 Ohio, 33; *Turner vs. Hitchcock*, 20 Ia., 310.

§ 5. *Evil Intent or Negligence Required.*—The court instructs the jury, that the defendant ought not to be found guilty in this action, unless the jury believe, from the evidence, that the defendant, in inflicting the injury complained of, was guilty of some wrong or evil intent, or want of care and prudence; and if the jury believe, from the evidence, that the defendant struck the blow without any wrong or evil intent, or want of

reasonable care and prudence, they should find the defendant not guilty.

If the jury believe, from the evidence, that the defendant struck the plaintiff, under an honest belief that the blow was necessary in self-defense, and to prevent great bodily harm to himself, and that the circumstances were such, at the time, as to cause a reasonably prudent and courageous man to entertain such belief, and to apprehend such harm, then the jury should find the defendant not guilty. 2 Addison on Torts, § 790; Cooley on Torts, 164; *Paxton vs. Boyer*, 67 Ill., 132.

The jury are instructed, that in this case, the plaintiff cannot recover, unless the jury find, from the evidence, that the shooting was willful and intentional.

If the jury believe, from the evidence, that the defendant did not assault the plaintiff, but that, having the pistol in his hand for a lawful purpose, he, by the negligent or careless handling of the pistol, or by accident, discharged the pistol, and the plaintiff thereby received an injury, he cannot recover damages for such injury in this action. *Kral vs. Lull*, 49 Wis. 403.

If the jury believe, from the evidence, that the defendant had a pistol in his hands, but was not attempting to discharge it towards the plaintiff, and that the plaintiff assaulted the defendant, and by pushing and jostling him, caused the pistol to go off and thereby received an injury, without any intention on the part of the defendant that the pistol should be discharged, then the defendant would not be liable in this action for any injury consequent upon the discharge of the pistol. *Kral vs. Lull*, 49 Wis., 403.

§ 6. **Expelling Trespasser.**—The jury are instructed, that no one has a right to go upon the premises of another, even though it be his office, store, or place of business, after the owner has forbidden him to do so.

If a person enters upon the possession of another, and is requested to depart and refuses to do so, the owner of the premises may lawfully eject him therefrom; provided, he uses no more force than is reasonably necessary for that purpose. 1 Hill. on Torts, 186; *Woodman vs. Howell*, 45 Ill., 367; *McCarty vs. Fremont*, 23 Cal., 196; *Harrison vs. Harrison*, 43 Vt., 417; Addison on Torts, 793.

§ 7. **Repelling Force by Force.**—The court instructs the jury, that if they believe, from the evidence, that the defendant assaulted and beat the plaintiff in the reasonably necessary defense of his own person, after having been first assaulted by the plaintiff, and that he used no more force than was apparently necessary for such defense, then the jury should find the issues for the defendant.

While the law will not excuse or justify the use of more force than is reasonably necessary in self-defense, and to prevent receiving bodily harm, still, the law does make a reasonable allowance for the infirmity of human judgment under the influence of sudden passion or provocation, and it does not require men to measure with mathematical exactness, the degree of force necessary to repel an assault. The jury must judge from all the facts and circumstances, proved on the trial, whether the defendant did assault the plaintiff, and whether he did use more force and violence than was reasonably necessary under the circumstances.

If the jury believe, from the evidence, that the plaintiff made the first assault upon the defendant, then the defendant had a right to resist force by force, and to use so much force as was reasonably necessary to defend himself; and in case the jury find, from the evidence, that the plaintiff made the first assault upon the defendant, then to warrant a verdict for the plaintiff, the burden of proof is upon him to show that the defendant did use more force than was reasonably necessary under the circumstances to defend himself. *Ayers vs. Bristol*, 35 Mich., 501.

§ 8. **In Defense of Possession.**—That a person in the actual, peaceable and exclusive possession of property has a right to guard such possession by using force, if necessary, for that purpose. And in this case, if the jury find, from the evidence, that at the time of the alleged assault, and for ——— months before that time, the defendant was in the actual, peaceable and exclusive possession of the (*house*) where the disturbance is alleged to have occurred, and that at the time in question the plaintiff was attempting and endeavoring, by force, to enter such (*house*) against the will and orders of the defendant, then the defendant had a right to prevent such entry by

using force, and to use so much force as was reasonably necessary for that purpose.

§ 9. **Self-Defense—Excessive Force.**—Though the jury should believe, from the evidence, that the plaintiff made the first assault upon the defendants or some one or more of them, still, if they further believe, from the evidence, that the defendant, when so attacked, repelled plaintiff's assault with more force and violence, and did more injury to the plaintiff, than was reasonably necessary for their own protection from injury at his hands, then, as a matter of law, the defendants using such excessive force would be guilty of assault and battery, and you should so find by your verdict. 2 Addison on Torts, § 792; *Adams vs. Waggoner*, 33 Ind., 531; *Close vs. Cooper*, 34 Ohio St., 98.

The court further instructs the jury, that although you may believe, from the evidence, that the plaintiff met the defendants in a threatening attitude, armed with a club, and threatened that he was going to use the club over their heads, still, if you further believe, from the evidence, that the defendants there and then disarmed the plaintiff, and put it out of his power to do them any injury, then, as a matter of law, it was the duty of the defendants to have desisted from any further violence towards the plaintiff. And if you further believe, from the evidence, that the defendants, or either of them, used more force and violence towards the plaintiff than was reasonably necessary in so disarming the plaintiff, or if you believe, from the evidence, that after they had disarmed him, the defendants, or either of them, committed any further assault and battery upon the plaintiff than was necessary for their own protection, then such defendants would in law become the aggressors, and you should find such defendant, or defendants, guilty.

While the law makes reasonable allowance for the infirmities of human judgment under the influence of sudden passion, and does not require men to measure with mathematical exactness the degree of force necessary to repel an assault, still, it does require all men, even under the influence of sudden passion, to exercise reasonable discretion and forbearance in the infliction of injuries upon the person of another.

And, in this case, though the jury may believe, from the evidence, that the plaintiff first made an attack upon the defendants, or some one of them, still, if you further believe, from the evidence, that in repelling such attack, the defendant, or either of them, used a degree of force and violence towards the plaintiff greater than was apparently and reasonably necessary to repel such attack, and thereby caused unnecessary injury to the plaintiff, then it is your sworn duty, as jurors, to find a verdict of guilty against such one, or more, of the defendants as you find, from the evidence, took part in using such excess of force and violence.

Although the jury may believe, from the evidence, that the plaintiff caught hold of the defendant, and was about to strike or injure him with a (*hatchet*), still, if the jury further believe, from the evidence, that the defendant used more force and violence than was apparently and reasonably necessary to prevent injury to himself, then such excess of force would be unlawful, and the defendant, as to such excess, would be guilty of an unlawful assault upon the plaintiff.

§ 10. **Drunkenness no Justification.**—Although the jury may believe, from the evidence, that the defendant was drunk at the time he assaulted, and kicked, and struck, the plaintiff, if such assaulting, kicking and striking have been proved, still, the fact of drunkenness alone would be no excuse or justification for such assault.

§ 11. **Words of Provocation—Mitigation of Damages.**—That, while words of provocation do not justify an assault and battery, they may properly be considered in mitigation of damages; and if the jury believe, from the evidence, that, just before the assault complained of, the plaintiff used words to the defendant calculated to provoke a breach of the peace, and menaced the defendant with his fists, then such facts and circumstances may be considered by the jury in mitigation of damages, in case they find the defendant guilty. 1 Hill. on Torts, 185; *Keyes v. Devlin*, 3d E. D. Smith, 518; *Ireland vs. Elliott*, 5 Clarke (Ia.), 478; *Suggs vs. Anderson*, 12 Ga., 461; *Brown vs. Swineford*, 44 Wis., 282; *Burke vs. Melvin*, 45 Conn., 243.

§ 12. **Words of Provocation no Justification.**—If the jury believe, from the evidence, that the defendant committed the assault and battery complained of, in anger, caused by words spoken by the plaintiff, then the jury are instructed, as a matter of law, that words alone do not excuse or justify an assault and battery; they can only go in mitigation of damages.

If the jury believe, from the evidence, that the plaintiff, immediately before the assault complained of, used violent and abusive language to and concerning the defendant, and menaced and threatened him with personal injury, then these facts are proper to be taken into account, with all the other evidence in the case, in assessing the plaintiff's damages, if they find the defendant guilty.

§ 13. **Preponderance of Evidence Sufficient.**—That in this action, the plaintiff is only required to make out his case, by a preponderance of evidence, to entitle him to recover; and any of the evidence in the case, either circumstantial or positive and direct, which tends to produce belief in the mind of the jury, is proper to be considered by them, in determining whether or not the defendant is guilty. *Miller vs. Balthasser*, 78 Ill., 302.

FALSE IMPRISONMENT.

§ 14. **What Constitutes.**—The court instructs the jury, that in order to sustain a charge for false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence or laid hands on him, or shut him up in a jail or prison; but it is sufficient to show that the defendant, at any time or place, in any manner, restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he wished; provided, this is done without legal authority, as explained in these instructions. *Cooley on Torts*, 169; *Brushaber vs. Stagemann*, 22 Mich., 266; 2 *Addison on Torts*, 697; *Hawk vs. Ridgway*, 33 Ill., 473; *Bonesteel vs. Bonesteel*, 28 Wis., 245; *Harkins vs. State*, 6 Tex. App., 452; *Murphy vs. Martin*, 58 Wis., 276; *Gelzenleuchter vs. Neimeyer*, 64 Wis., 316.

If the jury believe, from the evidence, that the defendant

met the plaintiff at S., and took the plaintiff into his custody, and there kept him, and brought him to M. against his will, and offered to deliver him into the custody of the sheriff, then the defendant is guilty as charged in the declaration, and the jury should find for the plaintiff; unless the jury further find, from the evidence, under the instructions of the court, that the defendant was warranted in law in making such arrest, as explained in these instructions. *Hawk vs. Ridgway*, 33 Ill., 473.

To constitute an arrest and imprisonment, it is not necessary that the party making the arrest should actually use violence or force towards the party arrested, or that he should even touch his body. If he profess to have authority to make the arrest, and he commands the person, by virtue of such pretended authority, to go with him, and the person obey the order, and they walk together in the direction pointed out by the person claiming the right to make the arrest, this is an arrest and imprisonment within the meaning of the law. 2 Addison on Torts, § 799; Cooley on Torts, 169.

In order to constitute an arrest, an actual laying on of the hands, or personal violence, is not necessary; it is simply necessary that the arrested party be within the control of the officer or other person making the arrest, and submits himself to such control, in consequence of some claim of right to make the arrest, or threat to make it, by such officer or other person.

Any deprivation of the liberty of another, without his consent, whether it be by actual violence, threats, or otherwise, constitutes an imprisonment within the meaning of the law.

§ 15. **Trespassers are Jointly and Severally Liable.**—The court instructs the jury, that in an action of trespass, if the jury believe, from the evidence, that a trespass has been committed, as alleged in the declaration, and that there was more than one wrong-doer engaged in the trespass, then such wrong-doers are jointly and severally liable, and the plaintiff is under no obligations to sue all who are engaged in the trespass—he may, at his election, proceed against any one or more of such wrong-doers. *Ously vs. Hardin*, 23 Ill., 403.

§ 16. Who Liable as Joint Trespassers.—The court instructs the jury, that the law is, that all parties who engage in making an illegal or unlawful arrest, are trespassers; and if the jury believe, from the evidence, that the defendants, or either of them, restrained the plaintiff of his liberty, as charged in plaintiff's declaration, and without authority of law, as explained in these instructions, then such persons are liable to the plaintiff in this action. *Callaghan vs. Myers*, 89 Ill., 536.

If the jury believe, from the evidence, that the defendants, or either of them, arrested the plaintiff, as charged in the declaration, without lawful authority for making such arrest, as explained in these instructions, then your verdict should be for the plaintiff, and against such of the defendants as are shown, by the evidence, to have participated in making the arrest.

If the jury believe, from the evidence, that A. B., one of the defendants, and he alone, assumed the immediate control and detention of the plaintiff at the time in question, still, if you further believe, from the evidence, that the other defendants, or any of them, were then present, acting in concert with the said defendant A. B., and were wrongfully inciting him to arrest or imprison the plaintiff, then such other defendant or defendants will be equally liable with the said A. B.; provided you find him guilty, under the evidence and instructions of the court. *Whitney vs. Turner*, 1 Scam. (Ill.), 253.

If the jury believe, from the evidence, that the plaintiff had not committed any offense alleged in the defendants' pleas, and that both of the defendants concurred in laying hands on him and arresting him, then the jury are instructed that they should find both the defendants guilty, and assess the plaintiff's damages.

If the jury believe, from the evidence and under the instructions herewith given, that the defendants M. and M. were both engaged in the common purpose of unlawfully arresting the plaintiff, and that M. had laid hold of the plaintiff, and that M. immediately afterwards, in pursuance of said common purpose of unlawfully arresting said plaintiff, struck said plaintiff with a club, and that said striking was done in the presence of M., and that M. did not try to prevent the same, but on the contrary thereof, adopted and approved said act of

said M. in striking said plaintiff, then the jury are instructed that said M. is as responsible in this action for said striking as is M. *Mullin vs. Spangenberg*, 112 Ill., 142.

§ 17. **When not Liable as Joint Trespasser.**—Although the jury may believe, from the evidence, that the defendant C. proved up his claim before the justice of the peace, as testified to by the plaintiff, still, unless you further believe, from the evidence, that the said C. aided, advised or assisted in the arrest of the plaintiff, then you should find the said C. not guilty, unless you further find, from the evidence, that since the arrest he has approved or adopted the acts of those who did cause it. *Cooley on Torts*, 129; *Avrill vs. Williams*, 4 Denio, 295; *Abbott vs. Kimball*, 19 Vt., 551; *Snydacker vs. Brosse*, 51 Ill., 357.

If a person makes an application, in good faith, to a justice of the peace, for legal process, for a supposed just claim, and then attempts to prove it up before the justice, and does no more, this alone will not render him liable for the errors or mistakes, or even for the malicious acts, of such justice.

To warrant a verdict of guilty against the defendants, L. and R., the jury must believe, from the evidence, that they aided, abetted, encouraged or assisted in making the arrest, before or at the time the same was made, or else that it was done in their behalf and for their benefit, and that they have ratified and approved of the arrest since it was made; and if neither of these things appear to be proved by a preponderance of the evidence, then the said defendants, L. and R., should be acquitted.

§ 18. **Part of Defendants Only Guilty—Form of Verdict.**—If the jury believe, from the evidence, under the instructions of the court, that some of the defendants are guilty of the trespasses alleged in the declaration, and some not guilty, then the jury should find, in their verdict, in favor of the plaintiff and against those of the defendants who are so proven to be guilty, and as to the other defendants, that they are not guilty, and, in either case, mentioning the defendants by name.

§ 19. **Good Faith in Mitigation of Damages.**—If, from the evidence, under the instructions of the court, the jury find the

defendants, or any one of them, guilty, as charged in the declaration, still, if you further find, from the evidence, that in making the arrest complained of, such parties, in good faith and without malice, were only pursuing what they supposed were their just rights, by legal remedies, then this fact may be considered by the jury in fixing the amount of damages, and as tending to show that only actual damages should be given.

§ 20. **Exemplary Damages.**—If the jury find the defendants, or any of them, guilty of the arrest charged in the declaration, and if you further find, from the evidence, that such arrest was maliciously and wantonly made, then, in assessing the plaintiff's damages, the jury may give what, in law, are called exemplary or vindictive damages; that is, such damages as will not only give the plaintiff compensation for the damages actually suffered by him, but will also afford a wholesome example to others in like cases.

The court instructs the jury, that if they believe, from the evidence, that said defendants, or any one of them, at the time in question, injured the plaintiff, and put indignities upon her person, from vindictiveness, or a wanton or reckless disregard of her age or her infirmities, they may assess exemplary damages against the defendants, or such of them as the evidence shows are guilty, as charged in the declaration.

Exemplary or vindictive damages should not be given in a case of this kind, unless the jury find, from the evidence, not only that the defendants are guilty, but also that they acted maliciously or wantonly, and with wrongful intent, nor unless all the defendants against whom a verdict is rendered, were actuated by such malice, wantonness or evil intent.

INJURIES TO PERSONAL PROPERTY—NO PLEA OF JUSTIFICATION.

§ 21. **What Constitutes Trespass, etc.**—The court instructs the jury, that the gist of this action is the unlawful (taking and carrying away of the personal property of the plaintiff, from his possession, by the defendant); and if the jury believe, from the evidence, that at the time of the alleged trespass, the plaintiff was the owner of the property in question, and

had it in his possession, and that the defendant, without the consent of the plaintiff and against his will, took the property from the possession of the plaintiff and converted the same to his own use, then the jury should find the issues for the plaintiff.

§ 22. **What Possession Sufficient.**—The court instructs the jury, that a trespass to personal property consists in the unlawful disturbance, by force, of another's possession of such property, and in order to sustain the action it is only necessary that the plaintiff show that, at the time of the alleged trespass, he was the general owner of the property, and then in the actual possession of it, either by himself, his agent or servant, and, further, that the defendant unlawfully interfered with the property, either by injuring it, or by taking it and carrying it away without lawful right, and against the will of such owner. *Scott vs. Bryson*, 74 Ill., 420; *Cooley on Torts*, 436; *Addison on Torts*, § 442; 1 *Hill. on Torts*, 501; *Miller vs. Clay*, 57 Ala., 162.

In order to maintain an action for trespass to personal property, it is sufficient if the evidence shows that the plaintiff had what is called a special property therein, together with the actual possession of the property, and a right to such possession; and that the defendant unlawfully, and without right, interfered with or disturbed such possession, either by injuring the property or by taking it and carrying it away, against the will of the person so in possession. *Miller vs. Kirby*, 74 Ill., 242; *Cooley on Torts*, 436; *Addison on Torts*, § 442; 1 *Hill. on Torts*, 501.

§ 23. **Possession by Agent.**—If the jury believe, from the evidence, that at the time of the alleged trespass the plaintiff was the owner of the (*property*) in question, and was in possession of it, by himself, his agent or servants, and that the defendant took and carried away said property, and converted it to his own use, as alleged in the declaration, then the jury should find the defendant guilty.

If the jury believe, from the evidence, that at the time of the alleged trespass the plaintiff was the owner of the (*animal*) in controversy, and that the same was in the actual possession

of his (*brother*), as his agent or servant, then the possession of the (*brother*) was the possession of the plaintiff; and if the jury further believe, from the evidence, that while the property was so in the possession of the plaintiff, the defendant took and carried it away, as charged in the declaration, the jury should find the defendant guilty.

§ 24. **Possession as against a Wrong-Doer.**—That a person who is in the actual, peaceable and exclusive possession of personal property, without showing any other right, has a sufficient title in the property to maintain trespass against one who, with force, intermeddles with such possession without showing any right or title to the property, or to the possession thereof. Cooley on Torts, 436; Addison on Torts, § 442; *Scott vs. Bryson*, 74 Ill., 420; *Miller vs. Kirby*, 74 Ill., 242.

§ 25. **Special Property Defined.**—The court instructs the jury, as regards the term “special property,” that a person who is not the general owner of personal property, but has it in his possession, with the right to such possession for the time being, even as against the general owner, is deemed in law to have a special property in the property so in his possession, and such a person may maintain trespass against any one who unlawfully, with force, interferes or meddles with such possession.

PLEA OF JUSTIFICATION.

§ 26. **Intent Immaterial.**—To render a person guilty of trespass to personal property it is not essential that he should intend to do a wrongful act. It is enough if he willfully or negligently and unlawfully, by force, interfere with personal property in the actual, peaceable and exclusive possession of another, without the consent and against the will of the latter.

§ 27. **Acts, Prima Facie Trespass.**—The law is, that when the rights of private property are invaded by one whose acts would constitute a trespass, unless he is protected by legal authority, then it is incumbent upon such person to show, by a

preponderance of evidence, that he was justified, by legal authority, to do the acts complained of; and if he is unable to do this, he must be regarded as a trespasser. It is not enough that such a person intended to perform an official duty, but authority of law for the act complained of must exist, or he will be a trespasser. *Linblom vs. Ramsey*, 75 Ill., 246.

It is the duty of every one who assumes to interfere with the property of another, to ascertain that he has right and authority so to do, and he cannot excuse himself to any one who has been injured by his unlawful conduct, by merely showing that he was acting in good faith and without any intention to do wrong. And if the jury believe, from the evidence, that the defendants, or any of them, took away from the plaintiff's house any of his personal property forcibly and against his will, and without any right or authority, as explained in these instructions, then the jury should find for the plaintiff, as against such defendants, and assess his damages, if any, at the amount of his actual injury or damage, as shown by the evidence, although such defendants may have supposed they were right in what they did, and were not actuated by any malicious or wrongful motive.

§ 28. **Trespass, Ab Initio.**—If the jury believe, from the evidence, that before, and at the time of the alleged trespass, the plaintiff was the owner of, and in the actual, peaceable possession of the (*horse*) in question, and that the defendant F., against the will of the said plaintiff, took the (*horse*) from his possession, and (within a day or two thereafter), drove and used the said (*horse*), for his own pleasure and profit, and while using the (*horse*), willfully and wantonly, or without reasonable care and caution, drove the said (*horse*) at an unreasonable rate of speed, and overheated and thereby injured the said (*horse*), then the jury should find the defendant guilty of trespass in the original taking of the property; although the jury may further believe, from the evidence, that the defendant was at the time a constable, having in his hands to serve the execution introduced in evidence, and that he took said (*horse*) by virtue of said execution.

§ 29. **Justification by an Officer—Writ of Restitution.**—The court instructs the jury, as a matter of law, that the papers in

the case of (*M. B. vs. J. W.*), in the justice's court, and introduced in evidence in this case, authorized the constable, who served the writ of restitution in that case, to use so much force as was necessary to remove the plaintiff in this suit, his family and property, from the premises described in that writ. And if the jury should find, from the evidence, that the premises described in that writ, are the same as those described in the declaration in this case, and that the trespasses complained of are the acts done in execution of said writ, and that the constable W., in executing the writ, used no more force than was necessary in removing the plaintiff and his family and goods from the premises described in the writ, they should find the defendants not guilty.

The court instructs the jury, that the papers in the case of (*M. B. vs. J. W.*) in the justice's court, and introduced in evidence in this case, authorized the constable, who served the writ of restitution in that case, to use so much and no more force than was necessary to remove the plaintiff in this suit, his family and property from the premises, described in that writ. If the jury should find, from the evidence, that the premises, described in that writ, are the same as those described in the declaration in this case, and that the constable W., in executing the writ, used more force than was necessary, in removing the plaintiff and his family and goods, and thereby unnecessarily injured the plaintiff or his property, the defendant B. would not be guilty of such excess of force or injury, unless it appears, from the evidence, that he ordered, advised or assisted in such excess of force and injury, or afterwards approved of the same.

§ 30. **Property Taken on Execution.** —If the jury believe, from the evidence, that before the execution, introduced in evidence in this case, came into the hands of the said defendant F., the plaintiff had bought the property in question, in good faith, for a valuable consideration, of the defendant in the execution, and had taken the same into his possession, then, if the jury further believe, from the evidence, that the said defendant F., acting as constable, seized and took said property from the possession of the plaintiff, upon said execution, he would be guilty of trespass in taking said property,

and if either of the other defendants are shown, by the evidence, to have advised, directed, or aided the said F. in taking the said property, then the jury should find such other defendants also guilty of said trespass, equally with the said F.

§ 31. **What Constitutes a Levy.**—The court instructs the jury, that to constitute a valid levy upon personal property, it must be within the power and control of the officer when the levy is made; and he must take it into his possession within a reasonable time thereafter; and when the character of the property will admit of it, in such an open, public and unequivocal manner as to apprise the public that it has been taken on execution. He must so deal with the property, in order to constitute a good levy, as that, without the protection of the execution, his acts would make him a trespasser.

To render a levy on personal property complete, the officer must do some act, which, if he was not protected by his writ, would amount to a trespass; if a delivery bond is not given, he must, to affect third persons, take the property into his possession as soon as it can conveniently be done.

It is not a sufficient levy of an execution on personal property, as against third persons, for an officer to indorse a levy, with an inventory of the property, on the execution, in the presence of the judgment debtor, while the property is before them; the officer must also take the property into his possession. *Havely vs. Lowry*, 30 Ill., 446.

§ 32. **Levy Invalid, When.**—The court further instructs the jury, that if property seized, under an execution, is permitted to remain with the defendant for an unreasonable time after the levy, with the consent of the creditor, the levy will be deemed fraudulent and void as against a subsequent execution. *Davidson vs. Waldron*, 31 Ill., 120.

The law will not sustain a levy which is only colorable, and designed to shield the property from the claims of other parties—and, in this case, though the jury may believe that the execution in question was levied on the property in controversy at the time indorsed on the execution, still, if the jury further believe, from the evidence, that such levy was not

made in good faith, and with a *bona fide* intention of satisfying the said execution out of said property, but that, with the knowledge and consent of the plaintiffs in the execution, the said levy was made for the purpose of covering up said property, and keeping it for the benefit of the said (*defendant in execution*), then such levy was absolutely void, as against the other creditors of the said —, and the jury should so find, in determining the rights of the parties in this suit. *Murphy vs. Swadener*, 33 Ohio St., 85.

§ 33. **Officer Selling Growing Crops.**—If the jury believe, from the evidence, under the instructions of the court, that the defendant F. was guilty of trespass, in manner and form as alleged in the declaration, in levying upon and selling the property in question, and that the defendant B. bought the property at such sale, and took it and carried it away, claiming it under such sale, then B. would also be guilty of trespass jointly with said F., although such taking and carrying away was done at a subsequent time.

If the jury believe, from the evidence and under the instructions of the court, that the defendants, or either of them, levied upon and sold the property in question, and, in so doing, were guilty of trespass, as charged in plaintiff's declaration, and that the defendant B., after the sale, entered on the premises described in the plaintiff's declaration, and carried away corn, wheat and oats, grown thereon, claiming the same under such sale, then the jury should find the said defendant B. equally guilty with the other defendants who are shown, by the evidence, to have conducted, managed, aided or advised said sale.

§ 34. **Trespasser by Ratification or Adoption.**—The court instructs the jury, as a matter of law, that if an act of trespass is committed in the name of another person, or professedly in the interest of such other person, and the latter subsequently ratifies the act by claiming any benefit under it, he would be bound by the act to the same extent as if he had expressly authorized it before it was done. *Smith vs. Lozo*, 42 Mich., 6.

If the jury believe, from the evidence, under the instruction of the court, that the defendant A. B. (the officer), is guilty of

a wrongful taking of the property of the plaintiff under the execution introduced in evidence, and that after the property had been so taken the plaintiff went to the defendant C. B. (plaintiff in execution), and requested him to consent to a release of the property by the officer, and that he refused to so consent, then the jury may find the said defendants both guilty, although the defendant C. D. was not present at the time of the taking, and did not direct the officer to levy on the particular property in question. *Cook vs. Hopper*, 23 Mich., 511.

§ 35. **Landlord Liable—Seizure under Distress Warrant.**—The court instructs the jury, that if an officer, in executing a distress warrant, seizes the property of a stranger, and the landlord ratifies the act, and retains the property, after knowledge of the facts, he will thereby render himself liable for the trespass committed by the officer. *Becker vs. Du Pree*, 75 Ill., 167.

It is a rule of law, that where one person does an act professedly for the benefit of another, and as acting for him, but without any previous authority whatever, from such other person, to do the act, if, after the act is performed, the person for whose benefit it was done, with full knowledge of all the facts, adopts and ratifies the act, by availing himself of the benefits accruing to himself therefrom, he will be liable to all the consequences to the same extent as though he had fully authorized the act before it was done.

§ 36. **When Landlord not Liable.**—The court instructs the jury, that the delivery of a distress warrant to an officer, with direction to execute it, will not alone render the landlord liable for the unauthorized and unlawful acts of the officer and his assistants; and, in the absence of proof to the contrary, it will not be presumed that the landlord directed the officer to seize the property of any person other than the tenant named in the warrant.

The jury are further instructed, that if an officer executing a distress warrant seizes the property of a stranger, without the knowledge or consent of the landlord, the landlord will not be liable as a trespasser for the acts so done, unless he, in

some manner, with knowledge of the facts, approve and ratify the act after it is done.

§ 37. **Actual Damages Only.**—If the jury believe, from the evidence, that the defendants, or either of them, while executing a writ (of replevin) against J. D., took and carried away the property of the plaintiff, as alleged in his declaration, and that such defendants, at the time the property was taken, believed the same to be the property of the said J. D., and described in the writ of replevin, and that the same was not taken in a reckless, wanton, oppressive or malicious manner, and that all of the property so taken was afterwards returned to the plaintiff, then the plaintiff is entitled to recover in this suit no more damage than the jury believe, from the evidence, he actually sustained.

§ 38. **Exemplary Damages.**—If, from the evidence, under the instructions of the court, the jury find the defendant guilty, as charged in the declaration, then, if the jury further find, from the evidence, that the taking of the property was done under such circumstances, or in such a manner, as evinced a disposition on the part of the defendant to maliciously and wantonly possess himself of such property, regardless of the plaintiff's right thereto, then the jury are not confined in their estimate of damages to the actual value of the property taken, but they may assess, in addition thereto, such punitive or exemplary damages, by way of punishment to the defendant, as to the jury shall seem just and proper, in view of all the evidence in the case.

TRESPASS TO REAL ESTATE.

§ 39. **Actual Possession Sufficient, etc.**—The court instructs the jury, that a person in the actual and peaceable possession of land, will be presumed to be the owner, in the absence of any proof of title, and he may maintain trespass against any one who wrongfully invades his possession.

Although possession of land may have been acquired wrongfully by the plaintiff, this will not justify even the owner of the property in entering and taking possession forcibly, against

the will of the person in possession. *Cooley on Torts*, 326; *Ill., etc.*, vs. *Cobb*, 82 Ill., 183; *Austin vs. Bailey*, 37 Vt., 219; *Ill. & St. L. Rd. Co. vs. Cobb*, 68 Ill., 53; *Van Auken vs. Munroe*, 38 Mich., 725.

In order to maintain an action for trespass, it is only necessary for the plaintiff to prove that he was in the actual and peaceable possession of the property upon which the trespass is alleged to have been committed, and that the defendants, or some one or more of them, unlawfully interfered with such possession.

A person in the actual, peaceable possession of premises, is presumed to be there rightfully, and no one, not even the owner of the property, has a right to go upon the premises and forcibly eject the person so in possession, or remove his property therefrom against his will, unless the person so entering has some legal process from a court of competent jurisdiction, authorizing him so to do.

§ 40. **Trespasser by Ratification.**—The court instructs the jury, as a matter of law, that if they believe, from the evidence, that before and at the time of the alleged trespass, the plaintiff was in the actual, peaceable possession of the premises in question, and that at the time alleged some person professing to act for and in the interest of the defendant, W., in the absence of the plaintiff, and against his will, broke into the said rooms and removed the plaintiff's effects therefrom, without legal authority so to do, as explained in these instructions, and, further, that immediately after all this had been done, the defendant, W., knowing the facts, went in, and by himself, or his agent, took possession of the premises, and retained such possession, this would, in law, be a ratification by the defendant, W., of the acts of such other parties, and he would be liable therefor to the same extent as though he had participated in the acts of such other parties.

§ 41. **Trespass by an Agent.**—The jury are instructed, that the law is, that what one does by an agent is the same as if done by himself; and if the jury believe, from the evidence, that the defendant, W., shortly before the alleged trespass, employed A. B. as his agent or attorney to evict the plaintiff

from the premises mentioned in the declaration, and that in pursuance of that employment, and in the way of his said agency, the said A. B. took any steps towards getting the possession of said property away from the plaintiff, then the defendant, W., would be liable for all the acts of the said A. B. in attempting to obtain such possession, to the same extent as if he had done the same acts himself.

§ 42. **Entry under Legal Process.**—The court instructs the jury, that this is an action against three defendants, charging a joint trespass on real estate, and if the jury find, from the evidence, under the instructions of the court, that before, and at the time of the alleged trespass, the said defendant, F., was a constable, and had in his possession, to execute, the execution introduced in evidence, and by virtue thereof had levied upon and taken in execution the crops in question, and at the time of the alleged trespass entered upon the land for the purpose of making a sale of said property, by virtue of said levy, and that the defendants, T. and B., entered upon said land along with the constable, for the purpose of attending said sale, as spectators or bidders upon the property, then the defendants are not liable for trespass in this suit, unless they unnecessarily injured said real estate or the crops growing thereon, or other property situate on said premises.

§ 43. **Trespasser Ab Initio.**—The jury are instructed, that a person obtaining lawful and peaceable entry into the premises of another, may become a trespasser from the beginning, by an abuse of the privilege for which he professed to enter; and such abuse may consist in doing any unlawful act or thing injurious to the occupier of the premises and against his will. Cooley on Torts, 462; 1 Hill. on Torts, 105; *Snydacker vs. Brosse*, 51 Ill., 357; *Purington vs. Loring*, 7 Mass., 388; *Kimball vs. Custer*, 73 Ill., 389.

Although the jury may find, from the evidence, that the defendant, F., at the time of the alleged trespass, was acting as sheriff of this county, and that he had in his hands to execute, the execution introduced in evidence, and that he entered upon the premises in question for the purpose of making a levy upon the personal property situate thereon,

and did make such levy, and took and carried away said property, professing to act under said execution, still, if the jury further believe, from the evidence, that the plaintiff was the owner of the property, and in the peaceable possession of it at the time, and that the defendant, F., in making said levy and in taking away said property, did not act with reasonable care and prudence, but handled the same in a rough and grossly negligent manner, and that the goods were materially injured thereby, then such conduct was an abuse of the process of court, and the execution furnishes no protection to the said defendant, F., for the acts so committed, and the jury should find him guilty of trespass in making the original entry upon said premises.

The law is that, if a person has lawful authority to enter the premises for one purpose and he forcibly enters for a different purpose against the will of the person in possession, he will be guilty of a trespass. *Norton vs. Craig*, 68 Me., 275.

§ 44. Entry Obtained by Fraud.—The jury are instructed, that actual injurious force is not necessary to constitute trespass upon the premises of another, and that if a person obtains a lawful and peaceable entry into the dwelling-house of another, and then abuses the privilege for which he professed to enter, he will be a trespasser from the beginning. Such abuse may consist in doing any act or thing injurious to the occupier of the premises.

And in this case, if the jury believe, from the evidence, that the said A. B., by preconcert with the other defendants, and by false pretenses or by any subterfuge, obtained an entrance into the dwelling-house of the plaintiff, and after such entry, contrary to the express command, or against the known wishes of the plaintiff's (*wife*), unbolted and opened the door of said house for the purpose of allowing the other defendants to enter, and that they did then and there enter, then the entry of all the defendants was a trespass, and the jury should find the defendants guilty. *Kimball et al. vs. Custer*, 73 Ill., 389.

§ 45. Joint Trespassers.—The court instructs the jury, as a matter of law, that in an action of trespass, if it appears that

a trespass has been committed, all who encouraged, advised or assisted in the act of trespass, are equally guilty, whether they were present and took part in the act or not. *Barnes vs. Ennenga*, 53 Ia., 497. See *Boswell vs. Gates*, 56 Ia., 143.

In this case, if the jury believe, from the evidence, that the trespass complained of in the plaintiff's declaration, was actually committed by some one, then the law is, that any and all persons who encouraged, advised or assisted in such trespass are equally guilty with the person or persons who actually committed the trespass, by going upon the premises, etc. And if the jury further believe, from the evidence, that any, or either of the defendants encouraged, advised or assisted in the commission of such trespass, they should find such person or persons guilty.

If the jury believe, from the evidence, that before, and at the time the trespass is alleged to have been committed, the plaintiff was in the actual, peaceable possession of the premises, described in the declaration, and that in his absence and without his knowledge or consent, some person broke open the doors and entered the premises, and removed therefrom the personal property mentioned in the declaration, without right, as explained in these instructions, then the person so breaking into said premises, and every other person who commanded, encouraged, advised or assisted in such acts, if the evidence shows that there were such other persons, are all equally guilty of trespass.

§ 46. **Taking Personal Property, Aggravation, etc.**—That while this is an action for an alleged trespass to real estate, still, the taking and carrying away of the personal property described in the plaintiff's declaration, may be included in estimating the damages for trespassing on the real estate; provided, the jury find, from the evidence, that the defendants are guilty of trespassing upon the real estate, as charged in the declaration, and that they did take and carry away such personal property.

TRESPASS BY ANIMALS.

NOTE.—The statutes and local laws and customs of the different states, relating to domestic animals running at large, as well as those requiring the

owner of lands, under certain circumstances, to protect them by a sufficient fence, are so various, it is not easy to classify them. Some of these laws provide, that unless the owner causes his lands to be fenced with such a fence as is prescribed, he shall maintain no action for trespasses committed by domestic animals on said land. In some states the common law requiring the owners of such animals to keep them on his own land, is in force. In other states, from the earliest period, domestic animals have been allowed to run at large in the highways, and on unenclosed lands, either by general law or custom or by vote of the township or county. A more common provision is one requiring the respective owners of adjoining premises to build and maintain one half of the partition fence between them, the respective portions being determined by agreement, by prescription or by an order of the fence viewers.

In preparing instructions relating to these matters, no attempt has been made to do more than to furnish a few examples of the most general character.

§ 47. **Animals not Permitted to Run at Large.**—The court instructs the jury, that by the general law of this state it is unlawful to suffer or permit domestic animals, such as horses, cattle, sheep and hogs, to run at large in the public streets or highways, or on other unenclosed lands (except it be in counties, towns, cities or villages where such running at large is authorized by a vote of the legal voters of such counties, towns, cities or villages).

§ 48. **Owner of Lands not Bound to Fence.**—The jury are further instructed, that no person in this state is bound to fence his lands or premises against domestic animals, such as, etc., except in those counties, cities or towns where, by a special vote of the legal voters thereof, such animals are permitted to run at large. And the jury are further instructed, that there is no legal evidence in this case, that domestic animals could lawfully be permitted to run at large in the town of S., at the time when the trespasses complained of are alleged to have been committed.

If the jury believe, from the evidence, that, at the time of the alleged trespass, the plaintiff was in the actual and peaceable possession of the premises in question, and that the defendant, at the same time, suffered and permitted his hogs and cattle to run at large, and that while they were so running at large they entered and went upon the plaintiff's field, as charged in the declaration, and that the plaintiff was thereby

damaged, then he is entitled to recover in this case, whether his premises were protected by a good and sufficient fence or not.

§ 49. **Animals Lawfully Running at Large—Land Protected by Fence.**—If the jury believe, from the evidence, that, at the time of the alleged trespasses, the plaintiff was in the actual and peaceable possession of the premises in question, and had the same protected by “a good and sufficient fence” (*or by a good and legal fence, as explained in these instructions*) along the highway, and that the defendant’s cattle and hogs broke and entered the plaintiff’s field, as charged in the declaration, and further, that the plaintiff’s crops were thereby damaged; then the jury should find the defendant guilty; and, in such case, it is immaterial whether the defendant knowingly permitted the animals to run at large, or whether they escaped from his pasture into the highway without his fault.

The jury are instructed, that in this state, cattle and horses (*except bulls, etc.*) are permitted to run at large on the highways and open, unenclosed grounds, and all persons leave their lands and crops exposed to the intrusion of such animals at their peril. And in order to recover for injuries done to crops, by cattle escaping onto the land, where such crops are growing, from the highway, or from unenclosed lands adjoining, the injured party must show that he has his premises surrounded by “a good and sufficient fence” (*or by good and lawful fence, etc.*).

Though the jury may believe, from the evidence, that the defendant’s cattle went upon plaintiff’s land, and injured the crops thereon growing, as stated in his declaration, still, if the jury further believe, from the evidence, that the said premises were not enclosed by “a good and sufficient fence” (*or by a good and lawful fence, etc.*), and that the cattle went upon said premises, from the adjoining highway or unenclosed fields, by reason of there being no good and sufficient fence around plaintiff’s land, then he cannot recover in this case, and the jury should find the defendant not guilty.

§ 50. **What a Sufficient Fence—By Statute.**—The jury are instructed, in this state, fences (four and one-half feet high,

in good repair, consisting of rails, timber, boards and posts, hedges, or whatever the fence viewers of the town, where the fence is situated, shall consider equivalent to a fence, four and a half feet high, consisting of rails, timber, or boards and posts), are deemed in law legal and sufficient.

§ 51. **Animals Escaping through Division Fence.**—The court instructs the jury, that when two or more persons have enclosed lands adjoining, each owner is required by law to make and maintain a just proportion of the division fence between them, and the part and proportion of such fence, to be built and maintained by each, may be fixed and settled by the agreement of the parties themselves; and if they are unable to agree, then by the fence viewers of the town.

When the owners of adjoining lands are unable to agree, concerning the proportion of fence to be made or maintained, the matter may be submitted to the fence viewers of the town, as provided by the statute, and their decision, when made, will be binding upon both the parties.

In order to maintain the issues on his part, the plaintiff has only to prove that he was in the possession of the premises described in the declaration, at the time of the alleged trespass, and that the cattle and hogs of the defendant went upon said premises, as charged, through that portion of the fence which it was the duty of the defendant to make and maintain—if the evidence shows that he was bound to make and maintain any portion of said fence, as explained in these instructions.

If the jury believe, from the evidence, that the cattle and hogs of the defendant, broke and entered the plaintiff's field, as charged in the declaration, then it is wholly immaterial to the issues in this case, whether the plaintiff's fence along the highway, or his portion of the division fence, was in good or bad condition, provided, the jury further believe, from the evidence, that the animals in question did not get through plaintiff's fence along the highway, nor through his portion of the said division fence.

§ 52. **Burden of Proof.**—That the burden of proving the trespasses, complained of in plaintiff's declaration, is upon the

plaintiff, and if he has failed to prove the same, or any of them, by a preponderance of evidence, then the jury must find for the defendant, as to all the trespasses which the plaintiff has failed so to prove.

§ 53. **Entry through Plaintiff's Portion of the Fence.**—If the jury believe, from the evidence, that at the time in question, there was a line fence between the lands of plaintiff and defendant, that a portion of said fence was owned by each of the parties, then each was bound to keep in repair his own portion of the fence; and, if the jury further believe, from the evidence, that the plaintiff did not keep his portion in good and sufficient repair, and that by reason of such insufficiency, the animals in question came upon the plaintiff's land, and committed the trespasses complained of, then the defendant is not liable for any of the injuries occasioned by said stock. *Scott vs. Buck*, 85 Ill., 334.

If the jury believe, from the evidence, that the division fence in question, before the time of the alleged trespasses had been divided between the adjoining owners by agreement, and the portion of the fence to be kept in repair by each had been assigned to him, so that each had a designated portion of the fence to build and keep in repair, then it was the duty of the defendant to keep up such a fence on his portion of the line, as would turn his own stock, at all events. And, if the jury further believe, from the evidence, that the defendant did not do so, and that his stock got upon the plaintiff's land, as charged in the declaration, through that portion of the fence which the defendant was bound to build and repair, and then injured the plaintiff's crops, then the jury should find for the plaintiff. *Osburn vs. Adams*, 70 Ill., 281.

The law of this state, requiring the owners of adjoining lands that are enclosed to each build and maintain his proportion of the division fence, is intended exclusively for the benefit of said adjoining owners; and in this case, if the jury believe, from the evidence, that the cattle of the defendant broke into, or went upon the lands of one A. B., adjoining the lands of the plaintiff, and from thence came in upon the lands of the plaintiff, and injured the crops there growing, then the defendant is liable for such injury, whether the fence

between the plaintiff's land and that of the said A. B. was a good and sufficient fence or not. *Cooley on Torts*, 339; *Lawrence vs. Combs*, 37 N. H., 331; *Lord vs. Wormwood*, 29 Me., 282; *Lyons vs. Merrick*, 105 Mass., 71; *Cook vs. Morea*, 33 Ind., 497; *Aylesworth vs. Herrington*, 17 Mich., 417; *McManus vs. Finan*, 4 Ia., 283.

When two or more persons have adjoining lands enclosed in one common field by outside fences, and have no division fence, then, if there is no agreement or arrangement between them to the contrary, each person is bound to keep his own stock upon his own land, and if he does not do so, and injury results therefrom to an adjoining owner, he will be liable in trespass therefor. 1 *Addi. on Torts*, § 379; *Bradbury vs. Gilford*, 53 Me., 99; *Aylesworth vs. Herrington*, 17 Mich., 417.

CHAPTER XLIV.

TROVER.

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26. Demand by agent—Ground of refusal must be stated.

§ 1. **By General Owner.**—The court instructs the jury, that if they believe, from the evidence, that the plaintiff was the owner of the property in question, and entitled to the possession thereof, before and at the time of the commencement of this suit, and that while he was so entitled to such possession, and before the commencement of this suit, he made a legal demand of the defendant for the property, and that the defendant then had the property in his possession, and refused and neglected to surrender the same to the plaintiff upon such demand, this would be evidence of the conversion of the

property by the defendant, and the jury should find for the plaintiff. Puterbaugh's Com. Law, 497; Moore's Justice, § 301; 4 Am. & Eng. Ency., 117; Cooley on Torts, 442.

§ 2. **By One Having a Special Property.**—If the jury believe, from the evidence, that the (*animal*) in question was not the property of the defendant, but was the property of one A. B., and that the said A. B. had placed the same in the possession, and in the care and custody, and under the control, of the plaintiff, until he should call for the same, and that the plaintiff, at the time of the alleged conversion, was entitled to the possession of the (*animal*) then the plaintiff had such a property in it as will enable him to sustain this action; provided, the jury further find, from the evidence, that the defendant wrongfully took said property and converted the same to his own use, as charged in plaintiff's declaration. Cooley on Torts, 443; Moore's Justice, § 304.

§ 3. **Suit by One in Possession.**—That when a person is in the rightful and peaceful possession of property, and a stranger, or person not the owner, wrongfully takes it from him, and converts it to the taker's own use, then the person in possession can recover the full value of the property in this form of action for the wrong done—his possession being sufficient evidence of title in him against a wrong-doer, or one showing no right or title to the property. Cooley on Torts, 445; 1 Hill. on Torts, 495; *Craig vs. Gilbreth*, 47 Me., 416; *Moorman vs. Quick*, 20 Ind., 67; *Bowen vs. Fenner*, 40 Barb., 383; Moore's Justice, § 305.

Though you may believe, from the evidence, that the said A. B. was the general owner of the property, and is now entitled to the possession thereof, still, if you further believe, from the evidence, that before the time of the alleged conversion, the said A. B., as such owner, placed the said property in the possession, and under the care and control, of the plaintiff, for the purpose of having the same fed and taken care of by him (*or stored by him*), then such right and possession by the plaintiff of the property in question constitutes a sufficient special property therein to enable the plaintiff to maintain this suit; provided, you further believe, from the

evidence, that before the commencement of this suit, and while the plaintiff so had it in his possession, the defendant wrongfully took the property and converted it to his own use, within the meaning of the law, as explained in these instructions.

That although the law is, that to entitle the plaintiff to recover in this form of action, he must show that at the time of the alleged conversion he was the general owner of the property, and entitled to the immediate possession, or that he had a special right or interest in the property, with an immediate right of possession, yet, in this case, if you find, from the evidence, that the general ownership of the property was in one A. B., but that the plaintiff had the actual possession, charge and control of the property at the time of the alleged conversion, not as the agent or servant of the said A. B., then the plaintiff had such a property in the (*animal*) as will enable him to recover in this suit; provided, you find the defendant guilty of the wrongful conversion of the property, as charged in the declaration. Cooley on Torts, 442; *Stephenson vs. Little*, 10 Mich., 433; *Owens vs. Weedman*, 82 Ill., 409; *Dudley vs. Abner*, 52 Ala., 572; *Staples vs. Smith*, 48 Me., 470; 1 Hill. on Torts, 495.

§ 4. **What Interest Plaintiff Must Have.**—The court instructs the jury, that this is what is known in law as an action of trover, or trover and conversion, and, to entitle the plaintiff to recover, the jury must believe, from the evidence, that the plaintiff was the absolute owner of the property in question, or else that he had some special interest therein, which entitled him to the possession of the property at the time of the alleged conversion. Cooley on Torts, 442; 2 Greenl. on Ev., § 637.

§ 5. **Suit by Servant or Agent.**—The jury are further instructed, that when a person has personal property in his care and custody, as the servant or agent of the owner, and the property is taken from the possession or premises of the owner (or strays away, and is taken up by a person not the owner), then the duty devolving upon the servant or agent, as such, will not entitle him to maintain an action of trover for

the property. Cooley on Torts, 447; *Farmers' Bk. vs. McKee*, 2 Penn. St., 318.

§ 6. **Burden of Proof.**—The court instructs the jury, that in order to maintain this action, the plaintiff must prove, by a preponderance of evidence, that he was either the general owner of the property in controversy, and lawfully entitled to the possession thereof at the time of the alleged conversion, or that he had some special interest in it at the time of the alleged conversion, which entitled him to the possession of the property; and if the jury believe, from the evidence, that at the time, etc., the plaintiff was not the general owner of the property, and had no special interest in it, but was holding it as the mere servant or agent of the owner, then they must find for the defendant. 2 Greenl. on Ev., § 636 and 642.

In order to sustain this action, the plaintiff must show, by a preponderance of evidence, that at the time he demanded the (*animal*) from the defendant, if such demand has been proved, he was the owner of the property, and entitled to the immediate possession thereof, or that he had some right or interest in the same, which entitled him to the possession of it at the time; and if you find, from the evidence, under the instruction of the court, that he has failed to prove either of these things, by a preponderance of evidence, then you should find for the defendant. *Forth vs. Pursley*, 82 Ill., 152.

§ 7. **Plaintiff Must Prove Conversion.**—That to warrant a verdict, in this case, for the plaintiff, the jury must find, from the evidence, not only that the plaintiff was the general or special owner of the property, with the right to immediate possession at the time of the alleged conversion, but it must further appear, from the evidence, that the defendant wrongfully converted the property to his own use. Greenl. on Ev., § 636, 642; Moore's Justice, § 307.

You are instructed that a wrongful taking and carrying away of the personal property of another does not alone constitute trover, or trover and conversion. To render the taker liable, it must further appear that the property was taken and carried away by the person taking it, with an intent to convert the same to his own use, or that he has since the taking actually

converted it to his own use. And in this case, although you may believe, that the defendant wrongfully took and removed the property mentioned in the declaration, and placed the same in, etc., for safe keeping, intending to then store it for the use of the plaintiff, and to hold the same subject to his order, and so notified the plaintiff, then the defendant would not be guilty of a wrongful conversion of the property. *Niemetz vs. St. Louis, etc.*, 5 Mo. App., 59.

Although you may believe, from the evidence, that the defendant came rightfully into the possession of the property in question by finding the same (or taking the same up as an estray) still, if you further believe, from the evidence, that the plaintiff was the actual owner of the property, and entitled to the possession thereof, and that these facts were known to defendant, or that he had good reason to believe them to be true, and that he then, knowingly and intentionally, converted the same to his own use by selling the same, then this would constitute a wrongful conversion within the meaning of the law, and you should find for the plaintiff.

§ 8. **Property Lost—Negligence of Defendant.**—If the jury believe, from the evidence, under the instructions of the court, that the defendant came rightfully into the possession of the property, and while he held it so in possession, and before any demand was made on him for it, the (*animal*) was accidentally killed, without any willful intention on the part of the defendant (*or that the said goods were lost or stolen out of the possession of the defendant*), though he may have been guilty of negligence in that behalf, then the plaintiff cannot recover in this suit, although the jury may believe, from the evidence, that a demand was made by the plaintiff upon the defendant for the property before the property was commenced. 1 Addison on Torts, § 467, 471; Cooley on Torts, 449; *Bowlin vs. Nye*, 10 Cush., 416.

§ 9. **Demand and Refusal Prima Facie Evidence, etc.**—The jury are instructed, that when one person has property of another, whether rightfully or wrongfully, in his possession, and the owner is entitled to the immediate possession of the property, then a demand for such possession by the owner and a

refusal to deliver the property by the one so having it in possession, is *prima facie* evidence of a wrongful conversion of the property to his own use by the latter. 4 Am. & Eng. Ency., 115.

§ 10. **When Demand not Necessary.**—The jury are further instructed, as a matter of law, that while, in some cases, a demand by the owner, for the possession of property in the hands of another, and a refusal to deliver the same by such other person, is *prima facie* evidence of a wrongful conversion of the property to his own use by the person so having it in his possession, still, such demand and refusal are never essential before commencing a suit to entitle the plaintiff to recover; provided, it appears, from the evidence, that, before the commencement of this suit, the defendant had actually converted the property to his own use, by intentionally killing or destroying it, or by selling or otherwise disposing of it for his own benefit, and so as to deprive the plaintiff of it without his consent. *Gottlieb vs. Hartman*, 3 Col., 53; *Kenrick v. Rogers*, 4 N. W. Rep., 46.

§ 11. **What Amounts to Conversion.**—The jury are instructed as a matter of law, that when the property of one person comes rightfully into the possession of another, to be held by him temporarily for some specific purpose, and when that is accomplished, then to be returned to the owner, if the person so taking possession of the property willfully kills or destroys it, or sells it, or otherwise disposes of it, for his own use and benefit, and so as to deprive the owner of it without his consent, this, if proven, will amount to a wrongful conversion of the property, and no demand for the possession need be made by the owner before commencing suit to recover the value of the property. Cooley on Torts, 448; 4 Am. & Eng. Ency., 108; Moore's Justice, § 307.

If you find, from the evidence, that before and at the time of the alleged conversion, the plaintiff was the owner of the property in question, and entitled to the immediate possession thereof, and that while the plaintiff was such owner and entitled to such possession, and before the commencement of this suit, the defendant wrongfully took the property into his pos-

session, and that while the property was so in his possession the (*animal*) was killed (*or the goods were lost or stolen from his possession*), before the commencement of this suit, this will constitute a wrongful conversion of the property, and you should find the defendant guilty; and, in such case, it is wholly immaterial whether the plaintiff made a demand for the property before commencing the suit or not. 1 Addison on Torts, § 471; Cooley on Torts, 448.

§ 12. **Title Claimed by Purchase from the Owner.**—The jury are instructed, that as between the parties themselves, the title to personal property passes without delivery whenever the sale is completed, and the parties intend it as such. An agreement to sell an article by weight or measure, where the article is selected and identified, and the price agreed upon, may be a completed sale without delivery, if the parties intend it as such. Benj. on Sales, § 311; *Riddle vs. Varnum*, 20 Pick., 280; *Reed vs. Burgess*, 34 Ill., 193; *Prescott vs. Locke*, 51 N. H., 94; *Russell vs. Carrington*, 42 N. Y., 118; *Morse vs. Sherman*, 106 Mass., 430; *Lester vs. East*, 49 Ind., 588; *Wilkinson vs. Holiday*, 33 Mich., 386; *McClung vs. Kelley*, 21 Ia., 508.

As between the parties, delivery is not essential to the completion of a sale of chattels. If the sale is completed and nothing remains to be done but to deliver the property, then the purchaser may take the goods at any time after the sale; provided, he takes them before any lien attaches in the hands of the vendor and the transaction is conducted in good faith. *Cruikshank vs. Cogswell*, 26 Ill., 366.

If you believe, from the evidence, that the defendant agreed to sell, and did sell, the (*animal*) in question to plaintiff for \$——, and that it was agreed, at the time, that he should have thirty days in which to pay the money, then no delivery was necessary to vest the title of the property in the plaintiff.

If you believe, from the evidence, that the defendant bargained and sold the (*animal*) in question to the plaintiff, at a given price, to be delivered when paid for, and that the plaintiff afterwards, and within a reasonable time thereafter, and before the commencement of this suit, paid the purchase price in full, or paid a part thereof, and tendered to the plaintiff

the remainder, and then demanded the possession of the property, and that defendant, upon such demand, refused to deliver possession, and afterwards sold the (*animal*) to another person, without the consent of the plaintiff, then the plaintiff is entitled to recover in this suit. Hilliard on Sales, 119.

§ 13. **Tender.**—The jury are instructed, that a tender of any amount of money, if proved, in this case, has the same effect on the rights of the parties as a payment of the same amount would have had if made at the same time. Benj. on Sales, § 712.

§ 14. **Price not Paid—Right to Possession, When.**—The court instructs the jury, that in the case of a sale of personal property, at a stipulated price, and when no time of payment is agreed upon, the law presumes that payment is to be made at the time of delivery; and in such case, until the purchase price is paid, no such title passes to the purchaser as will enable him to maintain trover against the vendor for the conversion of the property, unless there has been a delivery of the property under the sale, or a tender of full payment has been made. Benj. on Sales, § 677; *Southwestern, etc., Co. vs. Plant*, 45 Mo., 517; *Scudder vs. Bradburry*, 106 Mass., 422; *Mich., etc., Rd. Co. vs. Phillips*, 60 Ill., 190.

In the case of a sale of personal property for cash, which is not paid at the time, and the property remains with the seller, he has a right to retain possession of the property until he is paid in full therefor, and if the purchase price is not paid, he may, after demanding payment of the purchaser, and waiting a reasonable time thereafter for payment to be made, sell the property to another person without rendering himself liable to an action of trover therefor, unless such payment is either made or tendered in full before such sale is made.

If you believe, from the evidence, that the plaintiff bought the (*horse*) in question from the defendant, and gave his note for a part of the purchase price, and that the defendant has since sold the note to a third person, in good faith, for a valuable consideration, and before the note became due, then, for the purposes of this suit, you should consider the case as though the note had been paid and the (*horse*) paid for in full by the plaintiff.

§ 15. **Temporary Possession—Not Delivery, When.**—That in the case of the sale of personal property, when the possession of the property is not transferred at the time of the sale, it is not enough to constitute delivery of the property that the purchaser obtains the temporary possession or control of the property for a specific purpose. To have the effect to vest the title in the purchaser in such a case, the jury must believe, from the evidence, that the possession was transferred by the seller to the purchaser with the intention of vesting the title to the property in the purchaser, under the contract of sale.

§ 16. **Suit against Warehousemen.**—If the jury believe, from the evidence, that at the time of the alleged conversion, the property in controversy was the property of the plaintiffs, and that they were entitled to the possession of it, and that the defendants then had the same in their possession, and if the jury further believe, from the evidence, that the plaintiffs, by their duly authorized agents, demanded the property of the defendants, and that they refused, without right, as explained in these instructions, to deliver up the property, this demand and refusal is *prima facie* evidence of a conversion of the property by the defendants to their own use.

If you believe, from the evidence, that the property in controversy belonged to the plaintiffs, and that they were entitled to the possession of the same, at the time of the alleged conversion of the property, and, also, that the plaintiffs demanded the same of the defendants before the commencement of this suit, and at the same time offered to pay to them all the freight, storage and other charges which had accrued upon the property in question, then, if you further find, from the evidence, that the defendants refused, upon such demand, to deliver the property to the plaintiffs unless the freight and charges upon other goods, not received or stored by the defendants at the same time with the goods in question, were also paid, then these facts would amount to a wrongful conversion of the property by the defendants to their own use, and you should find the defendants guilty. Edwd. on Bail, § 350, 351.

§ 17. **Warehouseman's Lien.**—The court instructs the jury, that a warehouseman, on receiving goods in the regular course

of his business, has a lien upon the goods for any advances which he may have made to the carrier for the carriage of the goods, and also for his reasonable charges for storage.

And, in this case, if you believe, from the evidence, that the defendants, A. and B., on or about, etc., received the property in question in the regular course of their business as warehousemen, and paid to the carrier the sum of \$——, which had accrued for the carriage of the goods, and afterwards kept the goods in store, then the defendants would have a right to retain the possession of the goods until the sum advanced by them, and all proper charges for storage, was paid or tendered. *Hale vs. Barrett*, 26 Ill., 195.

§ 18. **Tender—Waiver of Production of Money.**—If the jury believe, from the evidence, that the plaintiffs were the owners of the property in question at the time of the alleged demand and tender, and that the defendants then had the same in their possession, as warehousemen, claiming the right to hold the property until certain charges thereon should be paid, and that while they so held the goods, and before the commencement of this suit, the plaintiffs, by their agent, made a demand on the defendants for the property, and then offered to pay the sum of \$—— upon defendants' claim upon said goods, and that the sum so offered covered all that was then due to defendants for storage and all other charges on said goods, and, if the jury further believe, from the evidence, that upon such demand and offer the defendants refused to surrender the property, and told the person making such demand that he need not trouble himself to take out the money so proposed to be paid, as it would not be accepted, nor would the goods be delivered, unless plaintiffs first paid the sum of \$—— in discharge of defendants' claim on the goods, then this was a waiver of the necessity for producing and exhibiting to the defendants the money so proposed to be paid in order to constitute a good tender of that amount for the purposes of this suit. *Benj. on Sales*, § 714; *Hazzard vs. Loring*, 10 Cush., 267; 2 Greenl. Ev., § 603; 2 Pars. on N. & B., 623.

The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made. He may exclude any presumption against

himself that he admits the payment to be only for a part, but he can go no further, and his tender will not be good if he adds a condition that the creditor shall acknowledge that no more is due. Benj. on Sales, § 722; *Bowen vs. Owen*, 11 Q. B., 131.

§ 19. **Measure of Damages—Suit by General Owner.**—If, under the evidence and the instructions of the court, you find the defendant guilty, then the measure of the plaintiff's damages will be the value of the property at the time of the conversion, and six per cent. interest thereon since that date. *Tenney vs. State Bank, etc.*, 20 Wis., 152; *Hurd vs. Hubbell*, 26 Conn., 389; *Yater vs. Mullen*, 24 Ind., 277; *Polk vs. Allen*, 19 Mo., 467; *Cutter vs. Fanning*, 2 Ia., 580; *Repley vs. Davis*, 15 Mich., 75.

§ 20. **Damages, One Having Special Property.**—Though the jury may believe, from the evidence, that the defendants are guilty, still, if the jury further find, from the evidence and under the instructions of the court, that the plaintiff was not the general owner of the property, nor responsible to the general owner for its return, but only had a special interest therein as, etc., then he can only recover the value of such special interest. And if the jury further find that there is no evidence before them tending to show the value of such special interest, then the jury can only give a verdict in favor of the plaintiff for nominal damages.

§ 21. **Damages, Lien Holder.**—Though the jury may believe, from the evidence, under the instruction of the court, that the defendants are guilty of a wrongful conversion of the property in question, still, if the jury further believe, from the evidence, that the plaintiff was not the general owner of the property, but only had a lien thereon to secure an indebtedness due to him, then he can only recover the amount of such lien, including principal and interest; provided you find, from the evidence, that the value of the property exceeds the amount of such indebtedness. And in case the jury find the amount of such lien to be greater than the value of the property, then the measure of damages will be the value of the property at the time of the conversion, with six per cent. interest thereon.

§ 22. **Suit against a Lien Holder.**—If the jury, from the evidence, under the instructions of the court, find the defendants guilty, then they may assess the plaintiff's damages at the value of the property at the time the demand was made, with interest thereon at the rate of (*six*) per cent. per annum from that time, less whatever amount the jury find, from the evidence, was due to the defendants for (*freight and charges*).

§ 23. **Price Paid not Conclusive Evidence of Value.**—The jury are instructed, that the price paid or agreed to be paid for the (*horse*) in question is not conclusive evidence of the value of the (*horse*). The jury should fix the value of the property from a consideration of all the evidence in the case bearing upon that point.

§ 24. **Price Paid Prima Facie Evidence of Value.**—While the price paid for the property in question is not conclusive evidence of its value, it may be taken into account and considered by the jury, with the other evidence in the case, in determining what was the actual value of the property.

§ 25. **The Demand—What Constitutes.**—The court instructs the jury, that no particular form of words is necessary in making a demand for the possession of property before bringing a suit. If the jury believe, from the evidence, that, before commencing this suit, the plaintiff had an interview with the defendant, and that, from the language then used by plaintiff, the defendant understood the plaintiff came for, and was asking to have the property in dispute given up to him, and that with that understanding, defendant said * * * this in law would be equivalent to a demand and refusal. Cooley on Torts, 452.

The court instructs you, that while no particular form of words is necessary in making a demand for the possession of personal property, still, to constitute a valid demand, the language used must be such as to clearly denote that a demand is then made for the possession of the property, and so as to leave no reasonable grounds for doubt as to what property is referred to; and the demand must be made by some person

authorized to receive the possession, and then and there present to receive it.

To constitute a legal demand of property, in this class of cases, it is not necessary for the demanding party to make use of the word "demand," or to specify, by name or particular description, the property demanded; but any language which makes known to the party on whom the demand is made that the demandant desires the possession of the property, and informs him, by reference or otherwise, what property he desires possession of, is sufficient to constitute a demand. Cooley on Torts, 452.

§ 26. Demand by Agent—Ground of Refusal Must be Specified.—The court instructs the jury, that a party holding property, which he refuses to deliver on demand, because he doubts the authority of the person making the demand, must place his refusal distinctly upon that ground, or that excuse will not avail him upon the trial. If the refusal to deliver is placed upon any other ground at the time, the party cannot, after suit is brought, place his refusal upon different grounds, as an excuse for not delivering the property.

When a demand is made by an agent, and the person from whom the demand is made has reasonable grounds for doubting the agent's authority, he may lawfully refuse to comply with the demand. The evidence of agency should be such as an ordinarily prudent man would feel justified in acting upon, knowing that he would be liable for the value of the property if he should deliver it to a person not authorized to receive it. *Ingalls vs. Bulkley*, 13 Ill., 315; *Kime vs. Dale*, 14. Ill. App., 308.

[See *Replevin*.]

CHAPTER XLV.

USURY.

SUIT BY PAYEE OF NOTE.

- SEC. 1. Interest forfeited.
2. Presumption from the payment of usury.
3. Interest paid to be credited on principal.
4. Excess paid as commissions, etc., when not usurious.
5. Attempt to evade the statute.
6. Contract must be proved as pleaded.

SUIT BY ASSIGNEE.

7. Note given for usury.
8. Not growing out of antecedent transactions.
9. *Bona fide* holder. •

SUIT BY PAYEE OF NOTE.

§ 1. **Interest Forfeited.**—The court instructs the jury, that where a party contracts for, or receives a greater rate of interest, than is allowed by law, and usury is pleaded, he cannot recover any interest whatever on the principal sum loaned, and all payments made upon the interest so agreed to be paid, if any are proved, must be allowed as payments upon the principal.

§ 2. **Presumption from the Payment of Usury.**—The court further instructs the jury, that if they believe, from the evidence, under the instructions of the court, that any usurious interest has been paid by the defendant, and accepted by the plaintiff, upon the transaction in question, then that fact is *prima facie* evidence of a usurious contract to pay such usury. Whether there was a usurious contract or not in this case, is a question of fact to be determined by the jury, from a consideration of all the evidence in the case. *Reinback v. Crabtree*, 77 Ill., 182.

§ 3. **Interest Paid to be Credited on Principal.**—The court instructs the jury, that if they believe, from the evidence, that the defendant borrowed of the plaintiff the sum of \$——, for which he gave the note sued on in this case, and that, at the time the money was so borrowed, it was agreed by the parties that the defendant should pay for such loan, besides the interest mentioned in the note, additional interest equal to —— per cent. per annum (*or the sum of \$——*), then such additional interest (*or additional sum*) made the transaction usurious; and, under the statute of this state, forfeits the whole of the interest.

And if you further believe, from the evidence, that the defendant has paid any interest on said note, then such payment must be credited as payment on the principal sum loaned, and you should find accordingly.

If you believe, from the evidence, that at or about the time the note sued on in this case was given, the defendant borrowed of the plaintiff the sum of (\$1,900) for the period of (*two*) years, and that in consideration thereof, and to secure the payment of the sum so borrowed, the defendant executed and delivered the note for (\$2,000), bearing interest at the rate of (*eight*) per cent. per annum from date, and if you further believe, from the evidence, that the (\$100) included in the note, in excess of the (\$1,900) borrowed, was allowed and agreed to be paid as interest on the sum borrowed, then the transaction was a usurious loaning of money, and, under the laws of this state, the plaintiff has forfeited the whole of the interest accruing upon the note, and your verdict should be for the amount originally loaned, less all the payments made thereon, whether of principal or interest, if any such payments are shown by the evidence. *Harris vs. Bressler*, 119 Ill., 467.

§ 4. **Excess Paid as Commissions, etc.**—If the jury believe, from the evidence, that the said A. B. was employed by the defendant to obtain for him a loan of money, with the understanding or agreement that he would pay or compensate the said A. B. for his services in obtaining said loan, and also that, at or about the date of the note in question, the said A. B. negotiated a loan from the plaintiff to the defendant—that

such loan was subsequently made, and the note in question in this suit given to secure the payment of such loan, then, if the jury further believe, from the evidence, that upon such loan being made, the defendant agreed to pay the said A. B. the sum of (\$100) for his services in effecting such loan, and that the said sum of (\$100) was not paid by the defendant, but, by agreement of all the parties, was included in said note, as a part of the principal thereof, this would not render the transaction usurious, and the jury should find for the plaintiff the full amount called for by said note, both principal and interest, after crediting thereon all payments, if any are shown by the evidence to have been made upon the said note. *Philips vs. Roberts*, 90 Ill., 492; *Cox vs. Life Ins. Co.*, 113 Ill., 382.

§ 5. **Attempts to Evade the Statute.**—The jury are instructed, as a matter of law, that every shift, device or trick which may be resorted to for the purpose of evading the statute against usurious contracts, will bring the transaction within the statute, as clearly as if its provisions had been directly and in terms violated; and if the transaction is, in truth and in fact, a loaning of money for a payment, made or agreed to be made, greater than the interest on the loan at the rate of (*eight*) per cent. per annum, the transaction is usurious.

And in this case, if you believe, from the evidence, that the defendant borrowed from the plaintiff the sum of—— dollars, and paid, or agreed to pay therefor, any sum greater, or in excess of the interest, at the rate of (*eight*) per cent. per annum, on the money borrowed, this would render the transaction usurious, and, under the laws of this state, would forfeit all interest upon said loan—and this would be so, even though the parties called the excess so paid, or agreed to be paid, a present or a bonus from the defendant to the plaintiff, or commissions paid to the plaintiff as an inducement to him to make the loan.

§ 6. **Contract Must be Proved as Pledged.**—The court instructs the jury, that the defense of usury, under our practice, must be specially pleaded, and strictly proved as pleaded. Under the pleadings in this case, the defendant, in order to

sustain his defense of usury, must show, by a preponderance of the evidence, that the contract of loaning was, etc., and that he paid (*or agreed to pay*) the sum of \$——, over and above the interest called for by the notes, for the purpose of giving plaintiff more than (*eight*) per cent. interest on the money loaned. And if the jury believe, from the evidence, that the agreement was other than that above stated, or that any other sum than that above stated was paid (*or agreed to be paid*) as usury, then the defense of usury is not made out, and the jury should find for the plaintiff for the amount due upon the note, including interest. *Frank vs. Morris*, 57 Ill., 138.

SUIT BY ASSIGNEE, ETC.

§ 7. **Note Given for Usury.**—The jury are instructed, that if they believe, from the evidence, that the only consideration for the note sued on was illegal or usurious interest, agreed to be paid by the defendant, as alleged in his plea, then the jury should find the issues for the defendant; provided, they further believe, from the evidence, that the note was assigned by the payee after it became due, or that the plaintiff had notice of such usurious transaction at the time the note was so assigned to him.

A note given for usurious interest is given for an illegal consideration, and is not binding upon the maker, unless it is in the hands of an innocent purchaser, who takes it in the regular course of business before due, for value, and without notice of such consideration; and if you believe, from the evidence, that the note in question, in this case, was given for usury, and that the same was assigned by the payee thereof after it became due, or that the plaintiff had notice of such illegal consideration at the time he purchased the note, then you should find for the defendant.

§ 8. **Note Growing out of Antecedent Usurious Transactions.**—The jury are instructed, that the defendant in one of his pleas, to which your attention has been called, has set up the defense of usury; and, regarding that defense, the court instructs you, as a matter of law, that if promissory notes are once tainted

with usury, the renewal of them, if the usury is added into the new notes, will not free the transaction from usury. The rule in such cases is, that the defense of usury may be interposed so long as any portion of the original debt remains unpaid in the hands of the original payee, or of any assignee thereof, if the note is assigned after maturity, or with notice of such defense; and in this case, if the jury believe, from the evidence, that the defendant has proved all the allegations of his plea of usury, as therein stated, by a preponderance of the evidence, then upon the question of usury the jury should find in favor of the defendant. 2 Parsons on Notes and Bills, 420; *Gray vs. Brown*, 22 Ala., 262; *Bridge vs. Hubbard*, 15 Mass., 96; *Walker vs. Bank, etc.*, 3 How., 62; *Powell vs. Waters*, 8 Cowan, 685; *House vs. Davis*, 60 Ill., 362.

If you believe, from the evidence, that the note in question was given in consideration of a usurious loaning of money, as stated and set forth in the defendant's plea, and also that the note was assigned or indorsed by the payee thereof to the plaintiff after it became due, or that the plaintiff had notice, when the note was assigned to him, that it was given upon such usurious loaning of money, then he can only recover in this case the amount of the money actually loaned, less all payments made by the defendant thereon, whether of principal or interest, if any such payments are proved, and you should find your verdict accordingly.

§ 9. **Bona Fide Holder.**—Although the jury may believe, from the evidence, that the note in question was given upon the usurious loaning of money, as stated and set forth in the defendant's plea filed in this case, still, if the jury further believe, from the evidence, that the note was assigned to the plaintiff before it became due, for a valuable consideration, and that the plaintiff had no notice of such usurious transaction at the time of the assignment to him, then he is entitled to recover in this suit the face of said note, principal and interest, less the payments indorsed thereon, and the jury should find their verdict accordingly.

CHAPTER XLVI.

WARRANTY.

- SEC. 1. What constitutes a warranty.
2. Intention not material.
3. What does not amount to a warranty.
4. Mere praise or boasting does not amount to a warranty.
5. Warranty must form a part of the contract.
6. Warranty after the sale.
7. Sale by sample—Implied warranty.
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10. Warranted equal to sample.

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11. Implied warranty of kind and quality.
12. Implied warranty.
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14. Purchaser may return property, or keep it and recoup, etc.
15. Machine on trial—Should give notice in reasonable time.
16. To be returned in a reasonable time.
17. When no implied warranty.
18. Defense—Fraud and breach of warranty.
19. Warranty of the soundness of a horse.
20. Defect must exist at the time of warranty.
21. Visible defects not warranted against.
22. Artifice to prevent examination by purchaser.
23. Burden of proof.
24. Measure of damages.

§ 1. **What Constitutes Warranty.**—The court instructs the jury, that to constitute a warranty it is not necessary that the word “warranty” or any particular word should be used in the contract; but if the jury believe, from the evidence, that the defendant made use of the expression, etc., and that under the circumstances the plaintiff had reasonable ground to suppose that a warranty was intended by the defendant, and that he did so suppose, and in making the purchase relied upon such supposed warranty, then the jury should find that there

was a warranty in fact. *Benj. on Sales*, § 613; *Thorne vs. Mc Veagh*, 75 Ill., 81; 1 *Pars. on Cont.*, 462, 463; *Rd. vs. Stout*, 17 Wal., 657; *Simar vs. Canaday*, 53 N. Y., 298; 2 *Kent's Com.*, 485; *Moore's Justice*, § 120.

No particular words or form of expression is necessary to create a warranty, nor need the word warranty be used. If the representation is positive and relates to a matter of fact, and not to a matter of opinion, and the other party receives the statement as true, and relies upon it in making the trade, such representation will constitute a warranty. *Robinson vs. Harvey*, 82 Ill., 58; *Smithers vs. Bircher*, 2 Mo. App., 99.

To constitute an express warranty, the word warrant need not be used, nor is any precise form of expression necessary to create a warranty; any affirmation of the quality of an article or thing sold made by the seller, at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and to induce him to make the purchase, if so received and relied upon by the purchaser, will amount to an express warranty. *Warder vs. Bowen*, 17 N. W. Rep. 943; *Patrick vs. Leach*, 8 Neb., 531.

And in this case, if the jury believe, from the evidence, that the note sued on was given by the defendant towards the purchase price of, etc., sold to him by the plaintiff, and that upon such sale the plaintiff represented to the defendant that the said (*machine, when properly used, was capable, etc.*) and that the said defendant, relying upon such representations, purchased the said (*machine*) upon the faith of the truth thereof, this, in law, would amount to a warranty that the said (*machine*) was, etc.

§ 2. **Intention not Material.**—The jury are instructed, that to constitute a warranty it is not necessary to show that the seller intended to cheat or deceive the purchaser in the sale of the property. It is wholly immaterial whether or not the seller believed his representations to be true at the time; the purchaser's right to recover for a breach of warranty, in such cases, does not depend upon the seller's intention to deceive, but upon the intention to warrant, or upon the fact of a warranty.

In order to constitute a warranty upon a sale, it is not

necessary that the representation should have been intended by the vendor as a warranty. If the representation is clear and positive as to the kind or quality of the article, and not a mere expression of opinion, and the purchaser understands it as a warranty, and, relying upon it, purchases the property, then the vendor cannot escape liability by claiming that he did not intend what his language declared or fairly implied. *Hawkins vs. Pemberton*, 51 N. Y., 198; *Sparling vs. Marks*, 86 Ill., 125.

§ 3. **What Does not Amount to a Warranty.**—The jury are instructed, that while it is true, if the seller of personal property asserts, as a fact, anything regarding its qualities, and concerning which the buyer is ignorant, and the purchaser relies upon the statement in making the purchase, the assertion will amount to a warranty of the fact asserted; still, it is also true, that if the vendor merely states an opinion, or gives his judgment upon a matter of which he has no special knowledge, and upon which the buyer also might reasonably be expected to have an opinion and to exercise judgment, this is not a warranty. Benj. on Sales, § 567; *Hillman vs. Wilcox*, 30 Me., 170; *Chapman vs. Murch*, 19 John., 290; *Polhemus vs. Heiman*, 45 Cal., 573; Moore's Justice, § 121.

The mere expression of an opinion or representations concerning the qualities or capabilities of an article sold by the vendor, do not, of themselves, constitute a warranty; to amount to a warranty the language used must form a part of the contract of sale, and be such as to import or amount to a promise that the article in question does possess the qualities and capabilities mentioned in the alleged promise or contract, and the expressions or representations must be relied upon by the buyer, as a warranty, in making the purchase. *Worth vs. McConnell*, 42 Mich., 473.

To constitute a warranty there must not only be an affirmation by the seller respecting the quality of the article sold, but the affirmation must be made with a view of assuring the buyer of the truth of the fact asserted, and it must be received and relied upon by the buyer in making the purchase.

While, to constitute a warranty, the term warrant need not be used, nor any precise form of expression employed, still,

to constitute a binding warranty, there must be an affirmation as to the quality or condition of the thing sold, made by the seller, at or before the sale, for the purpose of assuring the buyer of the truth of the fact asserted, and of inducing him to make the purchase, and it must be so received and relied upon by the purchaser. *Benj. on Sales*, § 613; *Hawkins vs. Berry*, 5 Gilm., 36; *Bishop vs. Small*, 63 Me., 12; *Byrne vs. Jansen*, 50 Cal., 624; *Humphreys vs. Comline*, 8 Blackf., 508; *Hahn vs. Doolittle*, 18 Wis., 197; *Hawkins vs. Pemberton*, 51 N. Y., 198.

§ 4. **Mere Praise or Boasting not a Warranty.**—The jury are instructed, that mere praise or boasting indulged in by the owner of personal property, when offering it for sale, does not amount to a warranty of its quality or condition, if such praise or boastful remarks are but expressions of opinion or judgment concerning the property; provided, the purchaser has an opportunity to examine the property at the time, and does or does not do so, and where no artifice is used to prevent him making an examination. *Byrne vs. Jansen*, 50 Cal., 624.

When parties are negotiating a trade for property which there is an opportunity for examining, the owner of the property has a right to extol the value or desirable qualities of his property to the highest point which the credulity of the purchaser will bear, if he confines himself to mere expression of opinion or judgment. Such boastful assertions or highly exaggerated descriptions do not amount to a warranty; in such cases the parties are upon equal ground, and the purchaser must exercise his own judgment and abide the consequences.

§ 5. **Warranty Must Form Part of the Contract.**—The court instructs the jury, that to constitute a valid and binding warranty, the agreement to warrant must enter into and form a part of the contract of sale. If the agreement to warrant the article is not made at the time the trade is consummated or closed up, then it must be made during the negotiation between the parties, and so shortly before the sale and under such circumstances that the purchaser was reasonably justified in regarding it as continuing until the bargain was finished, and as forming one of the terms of the contract of sale. *Benj.*

on Sales, § 611; *Vincent vs. Leland*, 100 Mass., 432; *Wilmot vs. Hurd*, 11 Wend., 584; *Congar vs. Chamberlain*, 14 Wis., 258; *Summers vs. Vaughn*, 35 Ind., 323; *Bryant vs. Crosby*, 40 Me., 9.

§ 6. **Warranty after the Sale.**—That a warranty made after the contract of sale is concluded, if proved, is not binding, unless it is made as a new and separate contract, and upon some new consideration passing between the parties; and though the jury may believe, that upon the occasion in question, the plaintiff said to the defendant (*the horse is sound and true, and all right*), still, if the jury further believe, from the evidence, that this was not said until after the trade was completed, this alone would not constitute a binding warranty. *Towell vs. Gatewood*, 2 Scam., 22.

In order to make out the defense of warranty, and a breach thereof, it must appear, from the evidence, that the representations relied upon, if any were made, were made before the defendant accepted the property in question, under the contract of sale; and unless the jury believe, from the evidence, that the alleged warranty was made before the contract of sale was completed and the property delivered to the defendant, and accepted by him, as in compliance with the contract, then the jury should find for the plaintiff upon the question of warranty; provided, you find, from the evidence, that the property was so delivered and accepted by the defendant.

In order to constitute a warranty there must not only be an affirmation by the seller, respecting the quality or condition of the article sold, but it must be made with the view of assuring the buyer of the truth of the fact asserted, and must be relied upon by him, and be one of the inducements to him to purchase the goods.

§ 7. **Sale by Sample—Implied Warranty.**—The jury are instructed, that when goods are offered for sale under such circumstances that there is no reasonable opportunity to inspect them by the purchaser, and the vendor exhibits what he represents to be a sample of the goods so offered, and a sale is thereby effected, then the vendor impliedly warrants the quality of the bulk of the goods so sold to be equal to that of the

sample. *Benj. on Sales*, § 648; *Beirne vs. Dord*, 1 Selden, 95; S. C., 2 Sandf. Sup. Ct., 89; *Bradford vs. Manby*, 13 Mass., 139; *Farmer vs. Gray*, 20 N. W. Rep., 276.

If the jury believe, from the evidence, that there was a contract between the parties, by which it was agreed that the plaintiff should sell and deliver — cases of, etc., and that the plaintiff had with him what he represented as a sample of the goods to be delivered, then there was an implied warranty that the bulk of the articles so contracted to be delivered should be equal in value to the sample so shown; and if the goods forwarded to the defendant were not equal in quality to the sample, he was under no obligation to keep them.

§ 8. **Purchaser has Reasonable Opportunity to Inspect, etc.**—That it is an implied condition in all sales by sample, that the buyer shall have a fair opportunity of examining the bulk of the articles sold, and of comparing them with the sample before determining whether he will accept them or not. *Benj. on Sales*, § 594, 648; *Lorymer vs. Smith*, 1 B. & C., 1.

§ 9. **Sale, When Not by Sample.**—Although the jury may believe, from the evidence, that, at the time of the alleged sale, the plaintiff had with him, and showed to the defendant, what he represented to be a fair sample of the goods in question, still, if the jury further believe, from the evidence, that the defendant had an opportunity to inspect the goods in question, and did inspect them, as far as he desired to do so, and refused to purchase by the sample shown him, then there was no implied contract on the part of the plaintiff that the goods sold should equal the sample in quality or value.

§ 10. **Warranted Equal to Sample.**—If the jury believe, from the evidence, that the note in suit in this case was given by the defendant for a part of the purchase price of (*a machine*), sold by the plaintiff to the defendant, then, if the jury further believe, from the evidence, that the plaintiff, as a part of the contract of sale, warranted (*the machine*) so sold to be similar in make and equally as good as a sample (*machine*) then shown to the defendant, if you find, from the evidence, that such sample was shown, and if you also find, from the evidence, that the

(*machine*) sold was not similar in construction or equally as good as the sample, and that the defendant is damaged by reason thereof, then the jury should deduct the amount of such damage from the amount due on the note, and render a verdict in favor of the plaintiff for the balance; provided, you find, from the evidence, that such damage is less than the amount due on the note; and if you find the amount due on the note to be less than the amount of such damage, then you should deduct the amount due on the note from the amount of such damage, and return a verdict in favor of the defendant for the balance so found.

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§ 11. **Implied Warranty of Kind and Quality.**—The jury are instructed, that in a sale of goods for future delivery by name or description (as, for instance, wheat or No. 2 corn), if the property is not inspected by the buyer, then there is an implied warranty that the goods shall answer the description given, and be salable and merchantable; and if property is tendered under such a contract, which does not answer such implied warranty, the purchaser is not bound to accept it. *Benj. on Sales*, § 656; *Merriam vs. Field*, 24 Wis., 640; *McClung vs. Kelley*, 21 Ia., 508.

The law is, that under a contract to deliver a certain number of bushels of wheat, there is an implied warranty that the wheat is to be of a fair, merchantable quality; provided, the buyer has had no opportunity to inspect it; and if the jury believe, from the evidence, that the wheat which plaintiff offered to deliver to defendant was not of a fair, merchantable quality, then the defendant was under no obligation to accept the wheat, even though it was tendered. *Moore's Justice*, § 123.

§ 12. **Implied Warranty.**—The court instructs the jury, that in the case of a sale of personal property, where there is no opportunity for the purchaser to inspect it, there is an implied warranty that the property is of a fair, merchantable quality, in good condition, and fit for the use to which it is usually applied. *Merriam vs. Field*, 39 Wis., 578; *Van Wyck vs. Allen*, 69 N. Y., 61.

Though the jury may believe, from the evidence, that the parties entered into a contract by which the plaintiff agreed to deliver, and the defendant agreed to take brick, as alleged in the declaration in this case, still, if the jury further believe, from the evidence, that, as a part of the same contract, plaintiff warranted and agreed that the brick so to be delivered should be the same in quality, or as good as those used in the construction of, etc.; and if the jury further believe, from the evidence, that the brick claimed to have been tendered by the plaintiff were not as good in quality as those used in the construction of, etc., then the defendant was not bound to accept nor pay for the bricks so tendered.

§ 13. **Implied Warranty of Manufacturer.**—The court instructs the jury, that every manufacturer of machinery impliedly contracts with the person for whom an article of machinery is made, in the absence of a special agreement to the contrary, that the article manufactured shall be reasonably fit for the purpose for which it is made, and if the article is not so fit, then the manufacturer is liable for the damage occasioned by such unfitness.

Where a manufacturer sells a commodity, by a well known market description, and the commodity is not present at the time and place of trade, and is not seen or examined by the purchaser, the law will imply a warranty, on the part of the seller, that the commodity is of a fair, merchantable quality, corresponding to the description under which it is sold. And the same rule applies where the seller holds himself out as the manufacturer of the commodity sold, or sells under circumstances reasonably warranting the purchaser in believing him to be selling as a manufacturer. *Chi. P'k'g & Prov. Co. vs. Tilton*, 87 Ill., 547; *Robinson Machine Works vs. Chandler*, 56 Ind., 575; *Thomas vs. Simpson*, 80 N. C., 4.

If the jury believe, from the evidence, that the defendant purchased the machine in question of the plaintiff, and that the plaintiff was the manufacturer of said machine, or represented himself as such manufacturer, and that the defendant did not have a reasonable opportunity to inspect the machine before purchasing it, then the law implies a warranty, on the part of the plaintiff, that the machine was one reasonably fit

and suitable for the purpose for which it was sold to the defendant. And if the jury further believe, from the evidence, that the machine, at the time it was sold, was not reasonably fit and suitable for such purpose, and that the defendant, by reason thereof, has sustained damage to an amount equal to or greater than the amount of the note sued on, then the jury should find for the defendant; provided, you further believe, from the evidence, that the note in question was given for a part of the purchase price of the machine. *Benj. on Sales*, § 657; *Pars. on Cont.*, 467; *Mann vs. Everston*, 32 Ind., 355; *Bird vs. Mayer*, 8 Wis., 362.

If the jury believe, from the evidence, that the plaintiff sold the machine in question to the defendant, and that at the time of such sale the plaintiff made a verbal warranty that, etc., and agreed to take back the machine, at any time within — months from the date of such sale, and return the money paid therefor, in case the warranty should fail, and if the jury further believe, from the evidence, that said machine did not meet the requirements of such warranty, and that the defendant, within the said — months, notified the plaintiff of such failure, and to come and remedy the defect or take the machine away, and that the plaintiff did neither, then the property still belongs to the plaintiff, and he cannot recover in this suit for the price of the machine.

§ 14. **Purchaser may Return the Property or Recoup, etc.**—The rule of law is, in the case of a sale of personal property with a warranty, either expressed or implied, in the absence of fraud on the part of the seller, that if the thing purchased does not answer the terms of the warranty the purchaser may return, or offer to return, the property within a reasonable time, and thereby defeat the right on the part of the vendor to recover any part of the purchase money; or the purchaser may keep the property, and, when sued for the price, may set up the breach of warranty in recoupment of the plaintiff's damages. But, in such case, the vendor may recover the value of the thing sold, if it has any value for any purpose, notwithstanding its unfitness for the use for which it was sold. *Wander and another vs. Fisher*, 48 Wis., 338.

§ 15. **Machine on Trial—Should Give Notice in Reasonable Time.**—Where a party sells (*a reaping and mowing machine*), with an agreement, at the time, that if it should not prove to be a good machine, he will take it back or make it all right, he is under no obligation to take back the machine or make it all right, unless called upon to do so within a reasonable time after the sale.

§ 16. **To be Returned in Reasonable Time.**—If the jury believe, from the evidence, that the agreement between the parties was that defendant was not to keep the machine unless it suited him, and that he was to have the privilege of returning it if it displeased him, then, if he was not satisfied with the machine, he was bound to return it within a reasonable time, and if he did not do so, he will be held to have elected to keep the machine, and pay for it at the agreed price.

§ 17. **When no Implied Warranty.**—The court instructs the jury, that where a person buys an article of personal property, and, before purchasing it, inspects the article, or has a reasonable opportunity to inspect it, and fails to do so, there is no implied warranty, on the part of the seller, as to the quality or value of the article purchased, so far as these might reasonably have been discovered by such inspection.

Where a person purchases an article of personal property, and at the time of the purchase the article is present and subject to reasonable inspection and examination of the buyer, as to its quality or value, then the purchaser takes the property at his own risk, so far as regards its workmanship and material, unless the seller expressly warrants the character of the same, or there is some concealed defect or fraud practiced.

If the jury believe, from the evidence, that the defendant purchased of the plaintiff the apples in question, at an agreed price, and that, at the time of such purchase, the defendant actually inspected the apples, and knew their condition, then the defendant is liable to the plaintiff for the full price so agreed upon, whatever may have been the actual condition of the apples at the time of the purchase.

If you believe, from the evidence, that the defendant purchased of the plaintiff the apples in question, at an agreed

price, and, at the time of such purchase, actually inspected a part of the apples, and might have inspected the remainder if he had wished to do so, and that the bulk of the apples were of like quality with those which he did inspect, then the defendant is liable to the plaintiff for the full price so agreed upon, whatever may have been the actual condition of the apples at the time of the purchase.

§ 18. **Defense—Fraud and Breach of Warranty.**—The court instructs the jury, that where a party purchases an article of personal property, and at the time of the purchase the article is present and subject to his reasonable examination, as to, its construction, quality and value, then the purchaser takes the property at his own risk, so far as regards construction, workmanship, material and value, unless the seller expressly warrants the character of the article in respect to these particulars, or unless he practices some trick, fraud or deceit upon the purchaser.

§ 19. **Warranty of the Soundness of a Horse.**—If the jury believe, from the evidence, that the plaintiff sold the horse in question to the defendant, and that just before or at the time of such sale, the plaintiff made any declaration or affirmation to the defendant regarding the condition of the horse, to the effect ("The horse is perfectly sound, well broke and true to work"), for the purpose of assuring the defendant of the truth of that statement, and for the purpose of inducing him to buy the horse, and if the jury further believe, from the evidence, that the defendant did believe such statement to be true, and, relying upon the truth thereof, bought the horse in question, this, in law, would constitute a warranty ("that the horse was perfectly sound, well broke and true to work"); and if the jury further believe, from the evidence, that such statement was not true at the time, but, on the contrary, that said horse was unsound or not well broken, etc., and that by reason thereof the defendant has been damaged, this would constitute a breach of the warranty, upon which the plaintiff would be liable for the amount of such damages. *Van Horsen vs. Cameron*, 54 Mich., 609.

If you believe, from the evidence, that during the negotia-

tion between the parties which led to the trade in question, the plaintiff said to the defendant ("The horse is sound and true, and I would not be afraid to warrant him, but you know my warranty would not amount to anything"), and did not afterwards take back or qualify this language, this would amount to a binding warranty that the horse was sound and true at the time; provided, the defendant relied upon the truth of such statement, and purchased on the strength of it. *Cook vs. Mosley*, 13 Wend., 277.

If the jury believe, from the evidence, that just before and at the time, etc., the plaintiff said to the defendant, I am no judge, etc., and the defendant replied, etc., this would amount to a warranty that the horse's eyes were sound, provided the jury further believe, from the evidence, that the defendant intended to convey the idea that the horse was sound and that the plaintiff so understood him and relied upon that declaration in making the purchase. *Patrick vs. Leach*, 8 Neb., 530.

§ 20. **Defect Must Exist at Time of Warranty.**—That a warranty made at the time of a sale of a horse, that he is sound and free from vice, is not a warranty that the horse will remain sound or free from vice. And if you believe, from the evidence, that the horse in question was sound and free from vice at the time of the sale, then, although the jury may further believe, from the evidence, that the horse afterwards became diseased, unsound or vicious, still, such after-acquired disease or vice would be no defense to an action brought to recover on a promissory note given for the purchase price of the horse.

§ 21. **Visible Defects not Warranted against.**—The court instructs the jury, that although they may believe, from the evidence, that the plaintiff, at the time of the sale, did say he would warrant the said horse to be perfectly sound, still, if they further believe, from the evidence, that the defendant had all reasonable opportunities, then and there, to inspect and examine the said horse, and if you further believe, from the evidence, that there were no defects or blemishes about the said horse's (*eyes*) which were not perfectly visible to an ordinarily skillful and cautious observer, then such blemishes or defects would not be covered by said warranty.

A general warranty of the soundness or quality of an article of personal property sold, does not include or cover defects or blemishes which are known to the purchaser, or which are open and visible to a person of ordinary skill and intelligence, at the time of the sale. To cover such defects, they must be expressly named or mentioned in some way, and warranted against, unless some art is used by the vendor to conceal, and he does conceal, such defects. *Benj. on Sales*, § 616; *Brown vs. Bigelow*, 10 Allen, 242; *Mulvaney vs. Rosenburger*, 18 Penn. St., 203; *Vandewalker vs. Osmer*, 65 Barb., 556.

§ 22. **Artifice to Prevent Examination by Purchaser.**—The jury are instructed, that the general rule that a warranty does not protect against defects that are plain and obvious to the senses of the purchaser, and which it required no special skill to detect, has no application if the vendor uses any art or trick to conceal the defect, and does conceal it, or if he uses any artifice or trick to withdraw the attention of the purchaser away from the defect, so as to prevent him noticing what he might otherwise have noticed. *Chadsey vs. Green*, 24 Conn., 562; *Brown vs. Bigelow*, 10 Allen, 242.

If the jury believe, from the evidence, that the plaintiff warranted the horse sold to be sound, at the time of the sale, and that, at that time, the eyes of the horse, or either of them, was so affected that the sight was impaired, and that the defect was of such a character that it could not be discovered by a person of ordinary care and skill in such matters, and was not discovered by the defendant, or, if the jury believe, from the evidence, that at the time in question, the plaintiff, by words or conduct, intentionally threw the defendant off his guard, so that he did not examine the horse's eyes as closely as he otherwise would, and, for that reason, did not discover the said defects, then the warranty of the plaintiff would cover such defects.

§ 23. **Burden of Proof.**—The court instructs the jury, that in so far as the defendant relies upon a warranty of the quality of the property sold and a breach of the same, the burden of proving the warranty is upon the defendant; and, unless

he has proved both the warranty and the breach alleged, by a preponderance of evidence, he will not be entitled to any benefit therefrom in this suit. *Burns, vs. Nichols*, 89 Ill., 480.

To entitle the plaintiff to recover, in this suit, it is not only necessary for the jury to find, from the evidence, that the plaintiff warranted the animal in question to be sound, at the time of the sale, but it must further appear, from the evidence, that the animal was unsound at that time; and, unless both these facts appear, from the evidence, the jury should find for the plaintiff, so far as regards the alleged warranty. *Bowman vs. Clemmer*, 50 Ind., 10.

In a suit to recover the price agreed to be paid for goods sold and delivered, if the defendant relies upon a warranty and breach, he must show the same by a preponderance of testimony, in order to make the defense available. *Maltman vs. Williamson*, 69 Ill., 423.

In this case it is incumbent on the defendant to establish, by a preponderance of the evidence, the warranty alleged in the declaration, and also a breach of such warranty as therein stated; and if, after carefully considering all the evidence in the case, you find the weight of the evidence is with the plaintiff upon either of these points, or is equal in weight with that of the defendant, regarding either the warranty or the breach of it, then, as a matter of law, you should find in favor of the plaintiff upon the question of warranty.

§ 24. **Measure of Damages.**—The jury are instructed, that the measure of damages for a breach of warranty of the soundness or quality of an article of personal property is the difference between the actual value of the defective article at the time of the sale and what it would have been worth if it had been as warranted. *Ferguson vs. Hosier*, 58 Ind., 438; *Aultman vs. Hetherington*, 42 Wis., 622.

If you believe, from the evidence, that the plaintiff sold goods to the defendant, and expressly warranted them, or at the time of the contract used any words which were intended to lead, and which did, in fact, lead the defendant to believe that plaintiff intended to warrant the quality of said goods, in manner and form as charged in the declaration, and that the

goods so sold did not fill the warranty, and for that reason were not as good in quality as those contracted to be sold to the defendant, then the defendant is entitled to a reduction from the plaintiff's claim to an amount equal to the difference between the actual value of the goods and what they would have been worth if they had answered the warranty.

CHAPTER XLVII.

WATERCOURSES.

- SEC. 1. Watercourse defined.
2. No right to divert ancient watercourse.
 3. Owner of soil, owner of surface and subterranean water.
 4. No right to obstruct the natural flow of surface water.
 5. Prescriptive right to obstruct the flow of water.

§ 1. **Watercourse Defined.**—To constitute a watercourse there must be a stream of water, including banks, bed and water. It is not necessary to prove that the water flows continuously. It may be dry at certain seasons of the year and yet be called a stream of water, but it must, at some period of the year, be a stream of water flowing in a well defined channel. *Schlichter vs. Philips*, 67 Ind., 201; *Peck vs. Herrington*, 109 Ill., 611.

A stream of water flowing over a man's land is a current of water flowing in one line or course, between banks or sides, in a certain direction. It may be dry in a dry time, but it must have a well defined existence as a stream, when there is water to run in it.

Occasional, sudden and temporary outbursts of water which in times of heavy showers and freshets fill up low land or marshy places and ravines, and overflow and inundate adjoining lands, are not deemed watercourses, unless such water flows off through a well defined channel which it has worn for itself.

§ 2. **No Right to Divert Ancient Watercourse.**—If the jury believe, from the evidence, that the nature of the country was such that after heavy rains or the melting of snows it naturally and necessarily collected together large quantities of water on defendant's land, and that such water was regularly discharged through a well defined channel which the force of the water had made for itself and that the water had been accustomed to flow through that channel from time immemorial, then such chan-

nel is an ancient watercourse, and the defendant would have no right to change the direction of such watercourse even on his own land, so as to discharge the water onto the plaintiff's land at a point different from what it had been accustomed to flow. *Schlichter vs. Philips*, 67 Ind., 201.

The owner of land through which a watercourse passes, has a right to receive the water, when the water in its natural channel enters his land, and to use it while it is passing over or through his land, but he must restore the water to its original natural channel whenever it leaves his land, to enter that of an adjoining owner. Angell on Watercourses, § 108.

§ 3. **The Owner of the Soil is the Owner of the Surface and Subterranean Water.**—The court instructs the jury, as a matter of law, that water that percolates through the soil, beneath the surface, with a known channel—water which temporarily flows upon, or over the surface from falling rains or melting snows, without a channel, but simply as the natural and artificial elevations and depressions of the surface may guide it, is regarded as a part of the land and belongs to the owner thereof, and he makes such use of the water as he sees fit, while it remains on his land. *Taylor vs. Fickas*, 54 Ind., 167.

§ 4. **No Right to Obstruct the Natural Flow of Surface Water.**—If the jury believe, from the evidence, that the plaintiff is the owner (or occupant) of the premises described in the declaration, and that said premises are higher ground than the adjoining premises occupied by the defendant, and that the natural flow of the water is from the premises of the plaintiff towards and onto the premises occupied by defendant, then the defendant is bound to receive upon his land, all the water which thus naturally flows from plaintiff's land onto his, and the defendant has no right to obstruct in any way, such natural flow of the water to the injury of the plaintiff. And if the jury further believe, from the evidence, that the defendant did so obstruct the natural flow of the water, from the plaintiff's land onto his own, to the injury of the plaintiff, then the plaintiff has a right to recover such an amount as damages, as the jury believe, from the evidence, the plaintiff has sustained.

The jury are instructed, that the plaintiff has no right, by ditches or other artificial means, to divert the water from his own land upon the land of the defendant. He has only the right to the natural flow of the water from his own land onto the land adjoining.

If the jury believe, from the evidence, that, prior to the acts complained of, the plaintiff, by the construction of the ditch or ditches, or by an artificial embankment, had collected together the surface water upon his own land (or had dug out springs), and thereby caused such water to flow in unnatural quantities upon the premises of defendant, or was thrown back upon defendant's premises in a different manner from what the same would naturally have flowed, and to his injury, then the defendant had a right to protect his premises from such unnatural flow of water by, etc.

If the jury believe, from the evidence, that the water from plaintiff's land did not naturally drain from his land by a flowing upon the defendant's land, but that he, by drains or other artificial means, attempted to, and did, drain the water from his own land, and caused it to flow in unnatural quantities upon defendant's land, and that defendant only stopped such unnatural flow by stopping the lower end of such ditches or other means of draining such lands, then he was justified in so doing, and is not liable for such acts, provided the jury believe, from the evidence, that such drains or ditches had not existed for twenty years before the acts complained of.

§ 5. **Prescriptive Right to Obstruct Flow of Water.**—If the jury believe, from the evidence, that, more than twenty years before the commencement of this suit, the owners of the premises in question, and now occupied by the plaintiff and the defendant, respectively, threw up an embankment of earth upon what was then understood and agreed to be the line between them, and that the defendant and his grantors have ever since maintained such embankment, not higher than it was originally built, but sufficiently high to prevent the flow of water from plaintiff's premises onto defendant's land, except in times of great freshets and high water, then the defendant has acquired, by prescription, the right to maintain and continue such

embankment; and if the jury further believe, from the evidence, that after said embankment had been thus maintained for twenty years or more, the plaintiff cut channels through the same for the purpose of draining his own land onto defendant's land, then the defendant had a right to fill up such channels.

CHAPTER XLVIII.

CONTESTING WILLS.

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2. Relatives have no legal or natural rights.
3. The essentials of a will.
4. The jury must take the law from the court.
5. Witnessing a will—What is sufficient.

INSANITY—UNSOUND MIND.

6. The issue to be tried.
7. Burden of proof.
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§ 1. **The Right to Make a Will.**—The court instructs the jury, as a matter of law, that every person of (*competent age, as fixed by statute*) and of sound mind, has a right to make a disposition of his estate by will, and to so devise his property as to divest those who would otherwise inherit it as his legal heirs, of their interest therein. Generally, the object of a last will and testament is to enable the testator to devise his property as to him may seem best.

§ 2. **Relatives Have no Legal or Natural Rights, etc.**—The jury are instructed, that no next of kin, no matter how near they may be, can be said to have any legal or natural rights to their kinsman's estate, which can be asserted against the will of said kinsman. The law of the land has placed every person's estate wholly under the control of the owner, subject to such final disposition of it as he may choose to make by his last will and testament, limited only by the statutory rights of his widow.

Children have no natural or legal rights to the estate of their father which can be asserted against his disposition of it by will.

All parents have a right to judge as to who are the proper objects of their bounty; and, if free from undue influence and insane delusions, and of sufficient mental capacity, may give their property to any person whomsoever. A child has no legal or natural right to the estate of its father which courts or juries can recognize against the will of the father. *Brace vs. Black*, 17 N. E. Rep., 66.

A man may change his will as often as it pleases him to do so, and the fact that he has changed it is of itself no evidence against the validity of the last will. The fact that the testator had executed previous wills, different in their character from the one last executed, if shown by the evidence, is immaterial in this case.

The jury have nothing to do with the fairness or unfair-

ness or the equity or inequity of the testamentary dispositions of the property; the only question for them to try is this: Is the writing offered the will of the deceased? And your verdict must be either that it is his will or that it is not.

§ 3. **Essentials of a Will**—(*See Different Statutes*).—The court instructs the jury, that to entitle a will to probate four things must concur:

First. It must be in writing and signed by the testator, or in his presence by some one under his direction.

Second. It must be attested by two or more credible witnesses.

Third. Two of the attesting witnesses must testify that they saw the testator sign the will in their presence, or that he acknowledged the same to be his act and deed.

Fourth. The two witnesses must declare on oath, or affirmation, that they believe the testator to have been of sound mind and memory at the time of signing or acknowledging the same.

§ 4. **The Jury Should Take the Law from the Court**.—The court instructs the jury, that it is their sworn duty, as jurors, to accept the law of this case from the court; and the jury are not permitted to determine what the law is according to their own unaided judgments, but, in arriving at a conclusion, they must determine the question of facts from the evidence, and be governed by the instruction of the court as to the law.

§ 5. **Witnessing Will—What is Sufficient**—(*See the Different Statutes*).—The court instructs the jury, that if they believe, from the evidence (given by the subscribing witnesses), that the deceased signed the paper, purporting to be his will, in the presence of one of the subscribing witnesses, and acknowledged it to be his act and deed to the other, and that they subscribed the same as such witnesses, at his request and in his presence, and if the jury further believe, that the deceased was of sound mind and memory at the time, then this is a compliance with the law, and is *prima facie* evidence of the due execution of the will.

The court instructs the jury, that it is not necessary that

the subscribing witnesses should know at the time of attesting it that it is the will, or that they should know the contents of it.

If the witnesses to a will, while signing their names thereto, as such witnesses, are in such a place that the testator can see them, if he chooses to, they are to be regarded as in his presence, within the meaning of the statute, and it is not necessary that they shall be in the same room with the testator, or that he shall actually see them sign. *Ambre vs. Weishaar*, 74 Ill., 109.

INSANITY—UNSOUND MIND.

§ 6. **Issue to be Tried.**—The jury are instructed, that the only question in this case for them to try is this: Is the writing offered the will of A. B., deceased? And your verdict will be, either that it is his will, or that it is not.

The question to be passed upon by the jury is this: Was the mind and memory of the deceased, at the time of the making of the alleged will, sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will, judging his competence of mind by the nature of the act to be done, and from a consideration of all the circumstances in the case. *Trisk vs. Newell*, 62 Ill., 196.

That, in the examination of wills, the sanity or insanity of the testator is always a question of fact, to be decided by the jury upon the whole evidence, according to the plain principles of common sense.

§ 7. **Burden of Proof.**—The jury are instructed, that when a will is proved, including soundness of mind and memory, on the part of the testator, by the testimony of two subscribing witnesses, and unsoundness of mind is alleged as a ground for setting the will aside, the fact of insanity, or of unsoundness of mind, must be established with reasonable certainty; the evidence of insanity should preponderate, or the will must be taken as valid. If there is only a bare balance of evidence, or a mere doubt only, of the sanity of the testator, the presumption in favor of sanity, if proved as above stated, must turn

the scale in favor of the sanity of the testator. Jarman on Wills, 5 Am. Ed., 104; Red. on Wills, 31-50; *Perkins vs. Perkins*, 39 N. H., 163; *Brooks vs. Barrett*, 7 Pick., 94; *Turner vs. Cook*, 36 Ind., 129; *Dickie vs. Carter*, 42 Ill., 376; *Terry vs. Buffington*, 11 Ga., 337; *In re Coffman*, 12 Ia., 491; *Cotton vs. Ulmer*, 45 Ala., 378.

When the party insisting on the probate of the will has established the sanity of the testator, at the making of the will, by the oath or affirmation of two of the subscribing witnesses, and that the will was legally executed, acknowledged and witnessed, as explained in these instructions, then a *prima facie* case is made out; and in such a case, the party seeking to contest the will, on the ground of insanity, fraud, compulsion, or for any other cause, takes upon himself the burden of proving the ground relied upon; and the cause relied upon must be proved by a preponderance of evidence; and if the question is left evenly balanced, the verdict should be in favor of the validity of the will.

The jury are instructed, that the burden of proof is upon the party asserting the sufficiency of the will to prove that, at the time of its execution, the testator was of sound mind and memory, within the meaning of the law, as explained in these instructions, and this is to be determined by the jury, not alone from the statements or evidence of any one or more persons, or class of witnesses, but from a consideration of the whole of the evidence in the case.

The burden of proving testamentary capacity is on the party alleging it, to the end of the trial, and such person must produce evidence sufficient to outweigh that which is opposed to sanity, or else sanity is not proved—and if the jury find that the evidence relating to the testator's mental soundness is equally balanced, then they must not allow the presumption of sanity to decide the question in favor of soundness. The burden of proof is upon the party alleging it to establish mental capacity by other evidence than the presumption of sanity. *Fraser vs. Jennison*, 42 Mich., 206.

§ 8. Sound and Disposing Mind and Memory.—The law is, that to be of sound and disposing mind and memory, so as to be capable of making a valid will, it is sufficient if the

testator has an understanding of the nature of the business in which he is engaged—a recollection of the property he means to dispose of—of the persons who are the objects of his bounty, and the manner in which it is to be distributed among them. It is not necessary that he should comprehend the provisions of his will in their legal form. It is sufficient if he understands the actual disposition which he is making of his property at the time.

If the mind and memory of a testator are sufficiently sound to enable him to know and understand the extent and amount of his property, and his just relations to the natural objects of his bounty, and the business in which he is engaged, at the time of executing his will, then he is of sound mind and memory within the meaning of the law. Jarman on Wills, 5 Am. Ed., 103, *et seq.*; 1 Red. on Wills, 123–135; *Freeman vs. Easley*, 7 N. E. Rep.

§ 9. **Test of Testamentary Capacity.**—The jury are instructed, that a testator, not affected with any morbid or insane delusion as to any of the natural objects of his bounty, possesses testamentary capacity, within the meaning of the law, if he has a clear understanding of the nature of the business in which he is engaged, of the kind and value of the property devised, and of the persons who are the natural objects of his bounty, and of the manner in which he desires his property to be distributed. *Fraser vs. Jennison*, 42 Mich., 206.

The will in question in this case is not a valid will unless the jury believe, from the evidence, that the testator, A. B., not only intended to make such a disposition of his property, as is here made, of his own free will, but was also capable of knowing what he was doing, of understanding to whom he was giving his property and in what proportions, and whom he was depriving of it as his heirs who would otherwise have inherited it; and was also capable of understanding the reasons for giving or withholding his bounty as to them. *McGinnis vs. Kempsy*, 27 Mich. 363; *Fraser vs. Jennison*, 42 Mich., 206.

§ 10. **Testamentary Capacity.**—The jury are instructed, that what is meant by testamentary capacity, as used in these instructions, is a rational understanding on the part of the

testator at the time of the making of his will, of the business he was engaged in, of the kind and value of the property devised, of the persons who were the natural objects of his bounty, and of the manner in which he wished to dispose of his property, unaffected by any morbid and insane delusion regarding any of these subjects.

The jury are instructed, that in order to make a valid will the law requires that a person shall be of sound and disposing mind and memory, as defined in these instructions—and testamentary incapacity does not necessarily require that a person shall be technically insane. Weakness of intellect, whether it arise from extreme old age, from disease or great bodily infirmity or suffering, or from intemperance, or from all of these combined, may render the testator incapable of making a valid will, provided, such weakness really disqualifies him from knowing or appreciating the nature, effects or consequences of the act he is engaged in. *McGinnis vs. Kempsy*, 27 Mich., 363.

§ 11. **Partial Insanity—Monomania.**—The court instructs the jury, that “a man who is very sober and of right understanding in all other things, may, in some one or more particulars,” be insane; that there is a partial insanity, and a total insanity; and that such partial insanity may exist as it respects particular persons, things or subjects, while, as to others, the person may not be destitute of the use of reason. And, although a testator has some insane delusion upon some subjects, yet, if he has mind enough to know and appreciate his relation to the natural objects of his bounty, and the character and effect of the dispositions of his property, then he has a mind sufficiently sound to make a valid will.

The court instructs the jury, that the law recognizes the difference between general and partial insanity, and if the jury believe, from the evidence, that the will here offered was made at a time when the testator was laboring under the influence of partial insanity, and is the product of such partial insanity, then it is as invalid as if made under the effects of an insanity ever so general.

A person may have, upon some subjects, and even generally, mind and memory, and sense to know and comprehend ordi-

nary transactions, and yet upon the subject of those who would naturally be the objects of his care and bounty, and of a reasonable and proper disposition as to them of his estate, he may be of unsound mind. 1 Red. on Wills, 63; Jarman on Wills, 5 Am. Ed., 77, 113.

§ 12. **Delusion Regarding Wife or Child's Property.**—The court instructs the jury, that if they believe, from the evidence in this case, that at the time the will in controversy was executed, the testator was laboring under an insane delusion in regard to the value of his wife's property, and that he was influenced or controlled in the making of said will by said delusion, or that the said testator was laboring under an insane delusion in regard to what amount of property he had already given to his daughter, and that in making said will he was influenced or controlled by such delusion, then the said testator was not of sound mind and memory, as is contemplated and required by the law, and any paper purporting to be a will executed by him under such circumstances, is not a valid and legal will, and the jury should find the issues for the contestants. 1 Red. on Wills, 72, 90; 1 Jarm. on Wills, 100 *et seq.*; Am. Bible Soc., 115 Ill., 623.

§ 13. **Sanity is Presumed.**—The court instructs the jury, that in all cases involving questions of sanity and insanity, *prima facie* the person is sane, and when there is only evidence sufficient to raise a doubt of a person's insanity, the presumption in favor of sanity must prevail. When a will or other instrument is made by a person of competent age, and under no legal disability, it will be taken and held to be valid and binding until incompetency is established, by a preponderance of evidence. *Wyatt vs. Walker*, 44 Ill., 485.

§ 14. **Insanity—How Determined.**—The jury are instructed, that in determining whether or not a man is insane, he should be compared with himself, and not with others. His manner, talk and actions at a time when it is alleged he was insane, should be compared with his manner, talk and action at a time when he was sane.

§ 15. **Settled Insanity Presumed to Continue.**—The jury are

instructed, that when settled insanity is once shown to exist, it is presumed to continue until restoration to reason is shown; but such presumption arises only in cases of settled insanity, and if complete restoration of reason is shown, then no more presumption of insanity arises in the case of the execution of a will than if the testator's mind had never been affected. 1 Red. on Wills, 112.

While it is true that, in the absence of any evidence, the law always presumes that a man is sane, yet if insanity, either partial or total, be proved to exist at any time before the making of a will, it will be presumed to have continued, unless the contrary be shown, by a preponderance of the evidence. *Menkins vs. Lightner*, 18 Ill., 282.

§ 16. **Intoxication.**—The jury are instructed, that neither intoxication, nor the actual stimulus of intoxicating liquor at the time of executing a will, incapacitates the testator, unless the excitement be such as to disorder his faculties and pervert his judgment. 1 Jarman on Wills, 5 Am. Ed., 97; *Gore vs. Gibson*, 13 M. & W., 623; *Gardner vs. Gardner*, 22 Wend., 526; *Thompson vs. Kyner*, 65 Pa. St., 368; *In re Convey's Will*, 52 Ia., 197.

§ 17. **Drunkenness Insanity, When.**—The court instructs the jury, that drunkenness itself is a species of insanity, and may invalidate a will made during the drunken fit; and long-continued habit of intemperance may gradually impair the mind and destroy its faculties, so as to produce insanity of another kind; drunkenness long continued, or much indulged in, may produce on some minds, and with some temperaments, permanent derangement and fixed insanity. Whether in this case intemperate habits or drunkenness on the part of the deceased have been proved, and whether his mind was thereby affected, and to what extent, if any, are questions of fact to be determined by the jury, from a consideration of all the evidence. 1 Red. on Wills, 160–162; 1 Jarm. on Wills, 5 Am. Ed., 97; Wharton & Stille, § 36 *et seq.*; Ray Med. Jur., § 390.

§ 18. **Intoxication May Produce Insanity.**—The court instructs the jury, that while it is not the law, that a dissipated man

cannot execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such an act; yet, if fixed mental disease has supervened upon intemperate habits, the man is as incompetent to execute a valid will as though such mental disorder resulted from any other cause. 1 Red. on Wills, 92 *et seq.*

§ 19. **Failure of Memory.**—If the testator's mind is sound, although his memory may be impaired, he may be of sound mind and memory in the sense in which the phrase is used in law; and in order to destroy the capacity of a person to make a will, on account of failure of memory, the failure must be such as to extend to his immediate family, relatives and friends, and the nature, extent and value of his property. 1 Red. on Wills, 95 *et seq.*

§ 20. **Old Age Does not Necessarily Incapacitate.**—The jury are instructed, that a man may freely make his last will and testament, no matter how old he may be; provided, he has the requisite mental capacity, and is a free agent in making it. The control which the law gives a man over the disposal of his property may be one of the most efficient means he has in old age of commanding the attentions usually required by his infirmities. 1 Red. on Wills, 95 *et seq.* See *Ames' Will vs. Blades*, 51 Ia., 596.

§ 21. **Previously Expressed Purposes.**—The court instructs the jury, that in determining whether the paper in question offered as a will is entitled to be so regarded, the paper itself may be considered in connection with all the other evidence in the case in determining the question of sanity or unsoundness of mind. And if the jury believe, from the evidence, that the deceased, before executing the will, had expressed any fixed purposes and intentions regarding the disposition of his property, at variance with the provisions of the alleged will, then the jury should consider whether or not the provisions of the will are inconsistent with sanity itself, and with his previously expressed and fixed purposes, and if the jury find that they are so, then these facts also should be weighed

by the jury in determining the question of sanity or unsoundness of mind of the deceased at the time of its execution. *Dye vs. Young*, 55 Ia., 433; *Stevenson vs. Stevenson*, 62 Ia., 163.

§ 22. Will may be Referred to as Showing, etc.—The jury are instructed, that while the provisions of the will may be considered by the jury, in connection with all the other evidence in the case, for the purpose of determining the mental condition of the testator at the time of its execution, still, in order to defeat the will upon the ground alone of the character of such dispositions, they must not only be in some degree extravagant, and apparently unreasonable, but they must depart so far from what should be regarded as natural and apparently reasonable, as to appear fairly attributable to no other cause than that of a disordered intellect or unsound mind. *In re Convey's Will*, 52 Ia., 197; 2 N. W. Rep., 1084.

The jury are instructed, that the unequal distribution of his property, by will, is not of itself any evidence of the insanity of the testator.

In determining the question of the validity of this will the jury have a right, and it is their duty, to take into consideration the provisions of the will itself, in connection with all the other evidence that has been offered in reference to the question whether the deceased was, or was not, of sound mind and memory at the time of its execution. *Ibid.*

§ 23. Expert Testimony.—The testimony of medical men of large experience in their profession, upon the question of the existence or non-existence of soundness of mind, is, as a general rule, entitled to more consideration than the testimony of unprofessional witnesses, who have not devoted their attention to the same class of studies.

The jury are instructed, that while it is true that the testimony of medical men of large experience, as a general rule, in this class of cases, is entitled to more consideration or weight in the minds of the jury than that of unprofessional men, still, whether the testimony of the medical men, who have testified in this case, is entitled to more weight than that of other witnesses, is a question entirely for the jury, to be

determined by them from a careful consideration of all the evidence in the case. *Meeker vs. Meeker*, 37 N. W. Rep., 773; *Blake vs. Rourke*, 38 N. W. Rep., 392.

§ 24. **Testimony of Subscribing Witnesses.**—The court instructs the jury, that the mere fact that a person is a subscribing witness to a will, does not entitle his opinion of the competency of the testator to execute the same, to any more weight than the opinion of any other witness equally credible and intelligent, and with equal opportunities for judging; and if it happens that he is selected, at the moment, merely for the purpose of meeting the legal requirements, his opinion as to the testator's strength of mind may be of very little weight or importance.

The weight of the evidence, from the opinions of subscribing witnesses, depends upon the same considerations which affect the weight of the opinion of any other witnesses upon the question of the testator's competency. Whether a subscribing witness or not, we must look at the intelligence of the man, and the means he enjoyed of forming the opinion which he advances, and give little or more weight to his opinion accordingly.

UNDUE INFLUENCE.

§ 25. **Issue to be Tried.**—The jury are instructed, as a matter of law, the only question, in this case, for them to try, is this: Is the writing here offered the will of A. B., deceased? And your verdict will be, that it is his will or that it is not.

And the real inquiry to be determined is: Did the said A. B., deceased, make and execute the alleged will, in all its provisions, of his own free will and volition, so that it now expresses his own wishes and intention, or was he constrained or coerced, through the undue influence, restraint or coercion of others, in making his will, to act against his own desire and intention, as regards the disposition of his property, or any part of it?

The burden of proof is upon the contestants to show that the making of the will was obtained by undue influence; and

in order to defeat the probate of the will on this account, it must appear to your satisfaction, by a preponderance of the evidence, that undue influence was employed; and, to constitute undue influence, it must appear to be such influence or restraint as caused the execution of the will by the decedent, against his own preference or desire in the matter. Mere advice or persuasion to induce a testator to make a will or influence the disposition of his property by will, is not undue influence. *Webster vs. Sullivan*, 12 N. E. Rep., 319; 58 Ia., 260.

§ 26. **What Must Appear.**—The jury are instructed, that no general rule can be laid down as to what constitutes undue influence in this class of cases, further than this, that in order to make a good will a man must be a free agent, and feel at liberty to carry out his own wishes and desires; and any restraint, threats or intimidations brought to bear upon the testator, which he has not the strength of mind or will to resist, if exerted so as to coerce him against his desire and purpose into the making of his will, or any of its provisions, is undue influence within the meaning of the law. And whether such undue influence existed in this case must be determined by the jury, from a consideration of all the evidence, in view of the law as given you by the court. *Bradford vs. Vinton*, 26 N. W. Rep., 401.

The influence exercised over a testator which the law regards as undue or illegal, must be such as to destroy his free agency in the matter of making his will; but it matters not how little the influence, if the free agency is destroyed it vitiates the act which is the result of it; and the amount of undue influence which will be sufficient to invalidate a will may vary with the strength or weakness of the mind of the testator; and the influence which would subdue and control a mind and will naturally weak, or one which had become impaired by age, disease or other cause, might have no effect to overcome a mind naturally strong and unimpaired. 1 Red. on Wills, 510.

To avoid a will on the ground of undue influence, it must be made to appear, by the evidence, that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity which could not be resisted, so

that the testator was constrained to do that which was against his actual will, and which influence he was unable to withstand, or too weak to resist. *Brick vs. Brick*, 66 N. Y., 144; *Barnes vs. Barnes*, 66 Me., 285.

The exercise of undue influence need not be shown by direct proof; it may be inferred from circumstances; but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator. *In re Smith's Will*, 22 Wis., 543; *Samson vs. Samson*, 25 N. W. Rep., 237, Note.

The jury are instructed, that any influence exercised upon the testator, if proved, by reason of which his mind was so embarrassed and restrained in its operations that he was not master of his own opinions and wishes, in respect to the disposition of his estate, was undue influence within the meaning of the law.

Any command or importunity addressed to the testator, if carried to such a degree as to control or restrain the free play of his will, judgment or discretion, in any matter affecting his will, was undue influence; and, if proved, in this case, will render the will in question invalid, though no force was used or threatened.

§ 27. **Undue Influence Must Affect the Will, etc.**—That to invalidate a will, on the ground of undue influence, it must appear, by a preponderance of the evidence, that such undue influence was practiced with respect to the will, or as to some matter or circumstance so connected with it, as to raise a presumption that such undue influence affected the provisions of the will; any degree of influence exercised over the testator which does not affect the making of the will or any of its provisions can not invalidate it. 1 Red. on Wills, 525; *Samson vs. Samson*, 25 N. W. Rep., 237, Note.

§ 28. **It Must Destroy Free Agency.**—That the influence which will vitiate a will on the ground of undue influence must amount to such a degree of restraint and coercion as to destroy the testator's free agency. To have that effect, in this case, the jury must believe, from the evidence, that the will in question was obtained by such a degree of restraint and co-

ercion upon the mind and will of the deceased as to destroy his free agency in some matter connected with the will, so that the will itself does not express his wishes or desires, but those of some other person. It is immaterial what arguments, influence or persuasion were brought to bear upon the testator; provided only, that in making his will he carried into effect his own will and intention, and not those of another.

§ 29. **Legitimate Influence.**—The court instructs the jury, that any degree of influence over another, acquired by kindness and attention, can never constitute undue influence within the meaning of the law, and although the jury may believe, from the evidence, that the deceased, in making his will, was influenced by the said A. B., still, if the jury further believe, from the evidence, that the influence which was so exerted was only such as was gained over the deceased by kindness and friendly attentions to him, then, such influence cannot be regarded, in law, as undue influence, and the verdict should be in favor of the validity of the will. 1 Red. on Wills, 522 *et seq.*; *In re Carroll's Will*, 50 Wis., 437.

It is not unlawful for one, by honest advice or persuasion, to induce a testator to make a will, or to influence him in the disposition of his property by will. To vitiate a will on account of undue influence it must appear, from the evidence, that there was something wrongfully done amounting to a species of fraud, compulsion or other improper conduct. *Yoe vs. McCord*, 74 Ill., 33; *Pierce vs. Pierce*, 38 Mich., 412.

It is not unlawful for a person, by honest intercession and persuasion, to induce a will in favor of himself or any other person; neither is it unlawful to induce the testator to make a will in one's favor by fair speeches and kind conduct, for this does not amount to that kind of compulsion, improper conduct or undue influence, which, in a legal sense, would render invalid the will. To have such an effect it must amount to a moral force and coercion, destroying free agency. It must not be the influence of affection and attachment, nor be the mere desire to gratify the wishes of another, but the compulsion in this case, in order to render the will invalid, must be of such a degree and character as to prevent the exercise of that dis-

cretion which is essential to a sound, disposing mind. *Dickie vs. Carter*, 42 Ill., 376.

§ 30. **Legitimate Advice or Persuasion.**—That, in this case, though the jury may believe, from the evidence, that the said A. B. did use arguments and importunities to influence the deceased in the making of the will in question, still this fact will, in no manner, affect the validity of the will, if the jury further believe, from the evidence, that such arguments and importunities did not deprive the deceased of his free agency or prevent him from doing as he pleased with his property, even though the will might not have been made in all of its provisions as it is, but for such argument and persuasion.

Though the jury may believe, from the evidence, that the testator, in making the will in question, acted upon the suggestions and advice, or under the influence, of the said A. B., this will not, in any manner, affect the validity of the will; provided he acted freely and from his own conviction in the disposition of his property, though the provisions of the will are not the same as they would have been but for such suggestions, advice or influence. *In re Carroll's Will*, 50 Wis., 437.

§ 31. **Cannot Question Testator's Motives.**—The jury are instructed, that if, from the evidence, they believe that the mind and memory of the testator was sufficiently sound to enable him to know and understand the extent, nature and amount of his property, and his just relations to the natural objects of his bounty, and to know and understand the business in which he was engaged, when he executed his will, then the jury have no right to inquire into or question the testator's motives for the disposition of his estate. That is a question under the absolute dominion of the testator.

§ 32. **Motives May be Inquired into, When.**—That while it is true that a testator's motives for the disposition of his estate are not matters affecting the validity of a will, yet this rule only applies in cases where it does not appear that the testator was of unsound mind, or possessed of insane delusions, which affected his act; and, in this case, if the jury believe, from the evidence, that at, etc., the mind of the deceased was affected

by any insane delusion regarding, etc., and that any of the provisions of the alleged will were prompted by motives based upon, or arising out of such delusion, this would render the will invalid.

The court further instructs the jury, that if it be manifest, from the will itself, that the testator believed that a sufficient provision had been made outside of the will for the support of his wife, and if it shall also be apparent from the will, that, in the making of the will, the testator was influenced by that belief, and that he would have provided differently for her had he not entertained such belief, and if the jury further find, from the evidence, that such belief was unfounded, and had, in no manner, been reasonably evidenced to him, then the jury have a right and ought to take these things into consideration in determining whether the testator was of sound mind when he signed his will.

§ 33. **Unlawful Cohabitation.**—The jury are instructed, that illicit sexual intercourse between a testator and his devisee, however immoral or illegal it may be, does not necessarily render the will of the testator invalid; nor could that circumstance, in any manner, affect the validity of the will if it was made by him with a sound and disposing mind and memory, and as a free agent. 1 Red. on Wills, 531–533; *Dean vs. Negley*, 41 Penn. St., 312; *Eckert vs. Flowry*, 43 Penn. St., 46.

The jury are instructed, that if they believe, from the evidence, that the testator and the said Mrs. P., before and at the time the will was made, were living in unlawful cohabitation, then the law will presume that undue influence was used by her over the deceased in the making of the will in question, and the burden of the proof is upon her to show that no such undue influence was used. *Leighton vs. Orr*, 44 Iowa, 679; 1 Red. on Wills, 531–533; *Wallace vs. Harris*, 32 Mich., 380.

§ 34. **Groundless Fears.**—If the jury believe, from the evidence in this case, that the testator A. B., at the time of the making of the will in question, had attained extreme old age, that his nervous system had become more than ordinarily sensitive, and that he had become timid and fearful, and that he was in constant dread of injury from the said E. B., then, al-

though the jury may believe, from the evidence, that no real cause existed for the said testator to be apprehensive of evil, or to fear injury from the said E. B., and that such apprehensions and fear proceeded from a morbid delusion of the testator, still, if the jury believe, from the evidence, that said will was the result or offspring of such delusion, and does not express the real wishes and intentions of the testator, then the jury should find that the said paper is not the will of the said A. B.

If the jury believe, from the evidence in this case, that the said A. B., at the time of the executing of the said paper offered in evidence as his last will and testament, was greatly advanced in age, in feeble health, and laboring under the fear of bodily hurt (*or imprisonment*) at the hands of the said E. B., and that the said paper was the result or offspring of such fears, and was not the result of his own free will, then the jury should find that the said paper is not the will of the said A. B.

§ 35. **Provisions of the Will May be Considered.**—That in determining the question of the validity of this will you have the right, and it is your duty, to take into consideration the provisions of the will itself, in connection with all the other evidence in the case bearing upon the question, whether the said A. B. was coerced by threats or fear of bodily harm into making the will in question, or whether he, in his lifetime, of his own free will and volition, made and executed the said will so that it expresses his own wishes and intention.

§ 36. **On Appeal from Probate Court.**—In *Fraser vs. Jennison*, 42 Mich., 206, 3 N. W. Rep., 576, the following instructions were given for the proponents on the trial of an appeal from the probate court.

“Gentlemen of the jury: you are called upon, in this case, to determine whether Alexander D. Fraser, on the seventeenth of May, 1877, possessed sufficient mental capacity to make a will.

“A paper has been offered in evidence, which the proponents claim to be his last will and testament. If you believe the testimony of the subscribing witnesses, the paper was executed

in accordance with the laws of this state; but conceding this to be true, it is claimed on behalf of the contestants that the paper is void, because Mr. Fraser, at the time of its execution, did not possess sufficient mental vigor or capacity to comprehend and realize what he was doing. This is the question of fact, or the principal question of fact, you must determine from the evidence that has been admitted. You must be careful, gentlemen of the jury, to confine your attention to the evidence introduced and not permit your minds to be influenced by any statements made in your presence or hearing by the counsel in this case, as to matters that were not permitted to go in evidence.

“The rule, gentlemen, stated by the weight of authority, undoubtedly is, that a less degree of mind is required to execute a will than a contract. Although the testator must understand substantially the nature of the act, the extent of his property, his relations to others who may or ought to be the object of his bounty, and the scope and bearing of the provisions of his will, and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in reference to them, yet he need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of body and mind would have, nor is he required to know the precise legal effect of every provision contained in his will.

“To use still another form of expression, gentlemen, the will is not valid unless the person making it not only intends, of his own free will, to make such a disposition, but has capacity to know what he is doing, or understanding to whom he is giving his property, in what proportions, and who he is depriving of it, as his heirs or devisees under the will he makes. When a man has mind enough to know and appreciate the natural object of his bounty, and the character and effect of the disposition of the will, then he has mind sufficiently sound to enable him to make a valid will.

“With these instructions in your mind, weigh the testimony of all the witnesses. Many of these were persons who spoke from actual knowledge of the deceased. Consider the testimony of those as well as that of the experts, and give to each and every one of them such weight as you may deem proper. This question of capacity is entirely and exclusively for your disposition and decision.

“It rests upon the proponents to satisfy you, by a preponderance of proofs, that the deceased was of sound mind when the paper was executed. As bearing upon the state of Mr. Fraser’s mind, his declarations—that is, what he said to persons—have been admitted, and are to be construed by you for this purpose only, not as proving any facts stated in the declaration.

“If, under these instructions, you reach the conclusion that A. D. Fraser possessed sufficient mental capacity on the 17th of May, 1877, to make his will, your verdict should be for the proponents. If, on the other hand, you determine he did not possess this mental capacity, your verdict should be for the contestants.”

§ 37. On Contest in Chancery.—In *American Bible Soc. vs. Price*, 115 Ill., 623, 5 N. E. Rep., 126, the following instructions, as to testamentary capacity, given for the proponents, were approved:

“The court instructs the jury, that if they believe, from the evidence, that Isaac Foreman, at the time he signed the paper in dispute, had mind and memory sufficient to transact his ordinary business, and that, when he made the will, he knew and understood the business he was engaged in, then the jury should find said paper writing to be the will of said Foreman.

“The court instructs the jury, that the owner of property who has capacity to attend to his ordinary business, has the lawful right to dispose of it, either by deed or by will, as he may choose, and it requires no greater mental capacity to make a valid will than to make a valid deed. And if such an owner chooses to disinherit his heir, or leave his property to some charitable object, he has a legal right to do so, and such disposition of his property is valid, whether it be reasonable or unreasonable, just or unjust; and the reasonableness or jus-

tice or propriety of the will are not questions for the jury to pass upon. If, therefore, the jury believe, from the evidence, that when he executed the paper in dispute, Isaac Foreman had capacity enough to attend to his ordinary business, and to know and understand the business he was engaged in, then he had the right and the capacity to make such a will, and the jury should find the paper in dispute to be the will of said Foreman. The court instructs the jury, that even if they find, from the evidence, that Isaac Foreman had, during some portion of his life, eccentricities or peculiarities, or even an insane delusion or partial insanity on the subject of religion, or masonry, or education, or any other subject, yet if they find, from the evidence, that at the time he made the will in question, he had sufficient mind and memory to understand his ordinary business, and that he knew and understood the business he was engaged in, and intended to make such a will, the jury should find such will to be the will of said Isaac Foreman.

“The court instructs the jury, that eccentricities or peculiarities, or radical or extreme notions or opinions upon religion, colleges, education, or masonry and secret societies, will not necessarily render a man incapable of making a will, and if the jury find that, in making the will in dispute, Isaac Foreman had sufficient mind and memory to understand the business he was engaged in when he made the will, then the jury should find in favor of said will, though said Foreman may have had eccentricities and peculiarities, or extreme notions and opinions upon religion, colleges, education, or masonry or secret societies.

“The court instructs the jury, that, in order to make a valid will, it is only necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and possessing this, though he may be feeble in mind and body from sickness or old age, he has the legal right to dispose of his property just as he pleases, without consulting either his family or his acquaintances. And if the jury believe, from the evidence, that when he executed the paper in dispute, Isaac Foreman knew what he was doing, and executed it as his will, understanding its nature and effect, and that, at

the time, he had sufficient mind and memory to transact his ordinary business, such as buying or selling or renting property, or collecting or paying out money or settling accounts, then the jury should find the paper in dispute to be the last will and testament of said Isaac Foreman."

On the part of the contestants, the following instructions were given and approved:

"If the jury believe, from the evidence, that, although Isaac Foreman had sufficient capacity to attend to the ordinary business affairs of life, yet that, with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty, he was insane, and that while laboring under such insanity he made the will in question, and that in making it he was so far influenced or controlled by such insanity as to be unable rationally to comprehend the nature and effect of the provisions of the will, and was thereby led to make the will as he did, then the jury must find the will not to be the will of the said Isaac Foreman.

"An insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe; such delusion may sometimes exist as to one or more subjects; and if the jury believe, from the evidence in this case, that Isaac Foreman was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property, and the natural objects of his bounty, when he made the will in question, and was, thereby, rendered incompetent to comprehend, rationally, the nature and effects of the act, and that but for such delusions he would not have made the will as he did, then the jury should find against the validity of the will."

CHAPTER XLIX.

WORK, LABOR AND SERVICES.

- SEC. 1. Implied contract.
2. Promise to pay implied, when.
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4. Warranty of skill and care implied.
5. Ordinary skill defined.
6. Acceptance of work.
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§ 1. **Implied Contract.**—The court instructs the jury, that when a contract for work and labor is entered into, and the terms agreed upon by the parties, with the understanding that it shall be reduced to writing, and one of the parties to the agreement enters upon the performance of it, without objection from the other party, the contract in all its terms will be as binding as if it had been reduced to writing. *Miller vs. McMannis*, 57 Ill., 126.

§ 2. **Promise to Pay Implied, When.**—While one person cannot make another his debtor without the consent of the latter, or recover for services rendered for another, without a request expressed or implied, yet, if one stands by and sees another doing work for him, beneficial in its nature, and overlooks it as it progresses, and does not interfere to prevent or forbid it, but appropriates such labor to his own use, then, in the absence of a special contract, a request will be implied, and the person for whom the work has been done will be liable to pay for the work what the same was reasonably worth, unless it expressly appears, from the evidence, that it was done as a gift or gratuity. 1 Pars. on Cont., 445; *De Wolf vs. City of Chicago*, 26 Ill., 44; *Allen vs. Richmond, etc.*, 41 Mo., 302.

The court instructs you, that when one person labors for another with his knowledge and consent, and the latter voluntarily takes the benefit of such labor, then the law will presume that the laborer is to be paid for his labor, unless the contrary is shown by the evidence, and if no special contract is proved, fixing the price, then the laborer is entitled to have what his services are reasonably worth. *Trustees of Farmington, etc., vs. Allen*, 14 Mass., 172.

Work and labor, if done at the request of the promisor, are a good consideration for a promise to pay for the same; and if the evidence shows that work and labor have been done and performed for another, with his knowledge and consent, or if he has voluntarily accepted and received the benefit resulting from such work and labor, then, unless there is evidence to the contrary, a request to perform it may be inferred from these facts.

When work and labor are done and performed for the benefit of another, with his knowledge and consent, and he

receives the benefit arising therefrom, then the law will presume a promise on his part to pay for the same; unless it appears, from all the evidence in the case, that such work and labor were done under a special contract, or as a gratuity or a gift. *O'Connor vs. Beckwith*, 41 Mich., 657.

Where no Price is Fixed.—If the jury believe, from the evidence, that the plaintiff performed labor and services for the defendant at his request, and that no price was fixed or agreed upon, then the law will imply a promise from the defendant, to pay the plaintiff, for such work and labor, what the same are reasonably worth.

§ 3. **Professional Services, Price Implied.**—If the jury believe, from the evidence, that the plaintiff rendered the professional services to defendant, or to his family, at his request, as claimed by the plaintiff, then the plaintiff is entitled to recover what the jury may believe, from the evidence, such services were reasonably worth, according to the usual charges of the (*medical*) profession in the vicinity, where the plaintiff lives, if the same is shown by the evidence, after deducting what payments, if any, the jury may believe, from the evidence, have been made therefor.

§ 4. **Warranty of Skill and Care Implied.**—If the jury believe, from the evidence, that the defendant employed the plaintiff to thresh his grain at an agreed price, then the plaintiff was bound in law to do the work in a workmanlike manner. And should the jury further believe, from the evidence, that the plaintiff, through negligence, want of care or skill, performed the work in a wasteful and slovenly and unworkmanlike manner, and that the defendant was thereby damaged in an amount equal to, or greater than, the sum claimed for the threshing, then the jury should find for the defendant.

If you believe, from the evidence, that the plaintiffs were the owners of, or in possession of, a threshing machine, which they were using about the country for hire, and that the defendant employed them to thresh his grain, at an agreed price, and that the plaintiffs knowingly undertook and performed such threshing with a machine defective and out of

repair, and that the defendant was thereby damaged, then the defendant has the right to offset the amount of such damages against the plaintiffs' claim for threshing. *Garfield vs. Huls*, 54 Ill., 427.

When a person engages to work for another, he impliedly contracts that he has a reasonable amount of skill for the employment, and that he will use it, as well as reasonable care and diligence; and a failure to do so, to the injury of his employer, will prevent him from receiving the full contract price. The employer may recoup or set off against the contract price the damages he may sustain for want of reasonable skill, or the observance of reasonable care and diligence in the performance of the work, if the same are proved by the evidence. 2 Pars. on Cont., 54; *Parker vs. Platt*, 74 Ill., 430.

When a person holds himself out to the public, or to those hiring him, as a person having the requisite experience and skill to perform any work or service requiring special knowledge or skill, he impliedly warrants that he possesses such knowledge as will enable him to do the work and perform the service, in a workmanlike and in an ordinarily skillful manner.

If you believe, from the evidence, that the plaintiff represented to the defendant that he was experienced and skilled in the business of (*making cheese*), and that he was employed by the defendants in that business, then there was an implied warranty on his part, that his work should be done in an ordinarily good and workmanlike manner; and if you further believe, from the evidence, that the plaintiff was not skilled or experienced in said business, and did not do his work in an ordinarily good and workmanlike manner, then the defendant had a right to discharge him from such employment. *Parkham vs. Daniel*, 56 Ala., 604.

If you believe, from the evidence, that some time on or about, etc., the defendant employed the plaintiff to manufacture (*cheese*) for him during the then succeeding summer, and that he commenced to work under that contract, and that he did not do his work in an ordinarily good, workmanlike and skillful manner, and that the defendant was thereby damaged to the extent of the value of such services, then the plaintiff is not entitled to recover for any part of such labor; provided, you further believe, from the evidence, that the defendant dis-

charged the plaintiff within a reasonable time after discovering the manner in which such work was done.

If you believe, from the evidence, that the plaintiff was employed by defendant to superintend (*the manufacture of cheese*) for him, and that he worked for the defendant at that business, for a time, still, if you further believe, from the evidence, that his work was not done in an ordinarily skillful and workmanlike manner, and that the defendant was thereby damaged, and that during the progress of the work the defendant did not, and by the exercise of reasonable care in that behalf could not, know of the defective manner in which said work was done, then you should set off the amount of such damage against the value of the work so done by the plaintiff.

§ 5. **Ordinary Skill Defined.**—The jury are instructed, that what is meant by ordinary skill, in these instructions, means that degree of skill which men engaged in that particular art or business usually employ; not that which belongs to a few men only of extraordinary endowment and capacities, but such as is generally possessed by men engaged in the same business. *Waugh vs. Shunk*, 20 Penn. St., 130.

§ 6. **Acceptance of Work.**—If the jury believe, from the evidence, that the defendant inspected the work in question, and knew its character and quality, and, with such knowledge, accepted the work done and materials furnished by the plaintiff as in compliance with and a full performance of the contract on plaintiff's part, then the plaintiff is entitled to recover whatever, if anything, the jury shall find, from the evidence, is unpaid upon the contract price. *Strawn vs. Cogswell*, 28 Ill., 457.

You are instructed, that no particular words or form is necessary to amount to an acceptance of work done or material furnished. Such acceptance may be by words or acts, if they are such as show that the party knew the character and quality of the work and material, and was satisfied therewith.

§ 7. **Usual Going Wages Implied, When.**—That when a person employs a person to labor for him, without any contract as to price, and, with knowledge of all the facts, accepts the

services without complaint, he will be presumed to have contracted to pay at the usual and going price for such services; and the fact, if proven, that the servant did not perform his work well, will not excuse the employer from paying such price. If he desires to relieve himself from such liability, the employer ought to discharge the servant.

§ 8. **Not Bound by Acceptance, When.**—The court instructs the jury, that when a party accepts work done for him, or material furnished, he does not thereby waive objections to any latent defects that may be in the work or in the materials, and which, at the time of acceptance, are not open to inspection and are not known to him. *Korf vs. Lull*, 70 Ill., 420; *Garfield vs. Huls*, 54 Ill., 427.

Though you may believe, from the evidence, that the plaintiff performed the work in question, and that the defendant saw the work, from time to time, as it was being done, and made no complaint in reference thereto, but accepted the work as done, still, if you further believe, from the evidence, that the defendant was not a judge of such work, or that the alleged defects, if they existed, could not have been seen by him, by reasonable diligence on his part, and were not seen by him, then he would not be estopped from showing the defective character of the work, if such defects exist; and if you further believe, from the evidence, that the work was not done in a good and workmanlike manner, by reason of the defective machinery, or of the careless manner of working the same, and that the defendant was damaged thereby, then you may deduct the amount of such damage from the price of the work, as found by you under the evidence.

ENTIRE CONTRACT.

§ 9. **Fulfillment Prevented by Defendant.**—If the jury believe, from the evidence, that the plaintiff has furnished the material and completed the building, mentioned in the contract, in a good and workmanlike manner, then, although the jury may further believe that the same was not completed within the time limited in the contract in that behalf, still, if the jury further believe, from the evidence, that the delay complained

of was caused by the defendant himself, and without fault on the part of the plaintiff, then the plaintiff is entitled to recover the balance, if any, unpaid upon the contract price, with (*sic*) per cent. interest thereon, from the time the same was payable by the terms of the contract. *Strawn vs. Cogswell*, 28 Ill., 457.

Although you should believe, from the evidence, that the plaintiff did not fully and in all particulars build and furnish the house according to the contract, still, if you further believe, from the evidence, that he substantially completed it, leaving but little to be done, and so far performed his contract as to erect a house useful to the defendant, and that defendant has taken possession and is using the same, then the jury should allow to the plaintiff the contract price for building the same, less such amount as it would take to construct these parts omitted or neglected to be built by the plaintiff. *Goldsmith vs. Hand*, 26 Ohio St., 101.

If you believe, from the evidence, that the plaintiff, by the consent of the defendant or by an agreement with him during the progress of the work, constructed some parts of the building of materials different from that required by the written agreement, or of a size and form different from that mentioned in the written agreement, still if you further believe, from the evidence, that the building as constructed was useful to the defendant, then the plaintiff is entitled to recover the contract price for erecting said building, less the difference in value of these parts so constructed, and their value, if they had been constructed according to the written contract, crediting the defendant, of course, with such amounts as you find, from the evidence, the defendant has paid upon the contract. *Goldsmith vs. Hand*, 26 Ohio St., 101; *White vs. Oliver*, 26 Me., 92.

You are instructed, that changes and alterations in the plan and design of the work in question are authorized to be made by defendant by the terms of the written contract introduced in evidence without in any manner invalidating the contract, except in so far as it should be so changed or altered; and if you believe, from the evidence, that any change or alterations were ordered during the progress of the work by the defendant or by any one authorized by him to order them, and that

such alterations and changes were made by the plaintiff, and that they required additional labor or material to be furnished by the plaintiff, then he is entitled to receive for such additional labor what the same was reasonably worth.

Although you may believe, from the evidence, that during the time the plaintiff was in the employ of defendant he did not turn out good work, still, if you further believe, from the evidence, that plaintiff's failure to turn out good work was owing to no fault of his, but was owing to defendant's neglect to furnish proper tools, stock or machinery, after notice by plaintiff to furnish the same, if such notice has been proved, then such failure to turn out good work would not alone justify defendant in discharging the plaintiff, nor affect the plaintiff's right to recover in this suit; provided you find that defendant did discharge the plaintiff for such reason before the expiration of the time for which he was hired, and that plaintiff has sustained damage thereby.

§ 10. **Substantial Performance.**—The rule of law is, that when a job of work is actually and substantially performed, though not in exact conformity with the contract in immaterial particulars, or with variations assented to by the employer, or when the employer accepts the work as and for a completed performance of the contract, then the workman may recover for his work and labor what the same are reasonably worth. *White vs. Hewitt*, 1 E. D. Smith, 395; *Dermott vs. Jones*, 23 How., 220; *Dutro vs. Walter*, 31 Mo., 516.

The law is, that when a party makes a special agreement to do certain work in a particular manner, within a fixed time, and he fails to do it in the manner or within the time agreed, yet, if he acts in good faith, and the other party receives any benefit from the work which is done, the law implies a promise by him to pay such sum therefor as the benefit which he receives is reasonably worth to him. *Snow vs. Ware*, 13 Met., 42; *Veazie vs. Bangor*, 51 Me., 509; *Blood vs. Enos*, 12 Vt., 625; *Parks vs. Steed*, 1 Lea (Tenn.), 206.

§ 11. **Entire Contract—Leaving without Good Cause.**—The court instructs the jury, that where one is hired for a definite time and leaves his employer against his employer's consent,

and without his fault, before such time has expired, he can recover nothing for the work he has done; and this rule holds as well where the wages are computed by the month, or week, as where they are computed for a gross sum for the whole time. The contract in such cases is entire, and the performance of the whole service is a condition precedent to the laborer's right of recovery. 2 Pars. on Cont., 36; *Miller vs. Goddard*, 34 Me., 102; *Reab vs. Moor*, 19 Johns., 337; *Webster vs. Wade*, 19 Cal., 291.

The court instructs you, that a contract to work for a given number of months, at a fixed price per month, is an entire contract for the whole number of months agreed upon, and when a person agrees to work for another for a given number of months, and to perform such services as are incident to his employment, at a fixed price per month, if he quits such service before the expiration of the number of months agreed upon, without a good and sufficient cause, and without the consent of his employer, he cannot recover for the work which he has already performed. *Hensell vs. Errickson*, 28 Ill., 257; 2 Pars. on Cont., 36.

The court instructs you, that where a party agrees to labor for a year for a certain sum, he must labor for that time to be entitled to any compensation, unless he leaves with the consent of his employer, or the treatment and conduct of the employer towards him is such as to reasonably justify him in leaving. If he quits before the expiration of the time for which he agreed to labor, without any sufficient cause, or for any cause which he has himself wrongfully provoked, he cannot recover for the time he has labored.

§ 12. **Payment a Condition Precedent.**—If the jury believe, from the evidence, that the services claimed and sued for in this suit, were rendered under a contract to work for a longer time than the plaintiff did work, and that the defendant was to make monthly payments for such services, by the terms of the same contract, and that he failed to make such payments as stipulated, then, upon such failure, the plaintiff had a right to abandon the service and to collect of the defendant what the services rendered would amount to at the stipulated price. *Folliott vs. Hunt*, 21 Ill., 654.

§ 13. **Burden of Proof.**—If the jury believe, from the evidence, that the plaintiff made a contract with defendant to work for him (*eight*) months from, etc. (or to work from that time until defendant's corn should be gathered in the fall), at an agreed price per month, and if the jury further believe, from the evidence, that before the end of the term so agreed upon the plaintiff left the employ of the defendant, then the burden of proof is upon the plaintiff to show, by a preponderance of evidence, that he left with defendant's consent, or was discharged by him, or that the plaintiff had just and reasonable cause for leaving when he did, otherwise he can recover nothing for the work done under such contract.

§ 14. **Pretext for Leaving.**—If the jury believe, from the evidence, that the plaintiff agreed to work for the defendant, at a stipulated price for the period of (*one year*), if they could agree, then, in order to justify the plaintiff in leaving defendant's service before the expiration of that period, if it appears from the evidence that he did so leave, there must have been some good reason for disagreeing with, and becoming dissatisfied with, the defendant. The plaintiff would have no right to manufacture a pretext for disagreeing with the defendant, and then take advantage of that. Whether such good reasons did exist in this case is a question of fact to be determined by the jury from the evidence.

§ 15. **Must be Substantial Cause for Leaving, etc.**—The court further instructs the jury, that when a person hires out to work for another for a certain fixed time, he has no right, on account of any frivolous or fanciful disagreement with his employer, or his employer's family, to break such contract and leave his employer's service. In order to justify such leaving there must be some good and substantial cause, which the jury can say, from the evidence, would justify a reasonable person in leaving such employment, or else the employer must in some manner prevent or waive a further performance of the contract.

NOTE.—The doctrine announced in the foregoing instructions regarding the right of recovery of an employe, leaving his employer's service without good cause, before the expiration of the time for which he was hired, is not

acknowledged in some states. It is held, in these states, that, in such cases, if the employer has derived any benefit from the labor performed, over and above the damage resulting to him from the breach of the contract, the law, thereupon, raises an implied promise to pay to the extent of the reasonable worth of the excess. In such cases the next five instructions will be proper.

§ 16. **Entire Contract—Rule of Damages.**—The law is, that when a person agrees to work for another for a fixed and definite period, and he performs labor under such contract which is of benefit or value to the employer, and then leaves before the expiration of the term for which he was hired, without his employer's consent and without reasonable cause, although he cannot enforce payment, according to the contract, he is entitled to recover what his services are reasonably worth, over and above the damages sustained by the employer from the breach of the contract by the laborer, less any payments which may have been made on the contract. 2 Pars. on Cont., 38; *Pixler vs. Nichols*, 8 Ia., 106; *Britton vs. Turner*, 6 N. H., 481; *Fenton vs. Clarke*, 11 Vt., 560; *Ralston vs. Kohl*, 30 Ohio St., 92; *Eakin vs. Harrison*, 4 McCord, 249.

If you believe, from the evidence, that the plaintiff performed any work for defendant, as claimed, and that the services were of any benefit to the defendant, and that the same have not been fully paid for, then, although you may further find that the work was done under an agreement to work for a definite time, at a given price, and that plaintiff left such employment before the expiration of that time, without defendant's consent, and without any good or reasonable cause therefor, still, the plaintiff is entitled to receive pay for such services what they were reasonably worth; unless you further believe, from the evidence, that the defendant sustained damage in consequence of plaintiff's so leaving, in which case plaintiff will be entitled to recover what such services were reasonably worth over and above such damages, if anything, less the payments which have been made thereon, if any are shown by the evidence.

If you believe, from the evidence, that plaintiff performed labor for the defendant, as claimed by him, and that such labor was performed under a contract to work for defendant for a

fixed and definite period of time, and that such services were of benefit or value to the defendant, and have not been paid for in full, and, further, that plaintiff left defendant's employ before the expiration of said period of time without any good or reasonable cause therefor, then the plaintiff is entitled to recover what such services were reasonably worth, if anything, over and above the damages sustained by the defendant, if any are shown by the evidence to have been sustained by him, on account of the plaintiff's so leaving, less any payments which have been made to the plaintiff on account of such work, if any are shown by the evidence.

The court instructs you, as a matter of law, that if one person agrees to work for another for a fixed and definite period of time, at an agreed price, to be paid at the expiration of the time, or from time to time, as the work progresses, and the laborer leaves the service of his employer before the expiration of the full time of his employment, without some good and reasonable cause therefor, and against the will of the employer, then he will only be entitled to receive for the work actually done what the same was reasonably worth, over and above the damages, if any, sustained by the employer, in consequence of the laborer leaving before the time fixed in that behalf.

If you believe, from the evidence, that some time on or about, etc., the plaintiff and defendant entered into a contract by which the plaintiff agreed to work for the defendant for the period of — months from, etc., at the agreed price of \$—— per month, to be paid monthly, and that the work sued for in this case was done under that contract, and if you further believe, from the evidence, that without any good or reasonable cause therefor the plaintiff left the defendant's employ before the expiration of the time fixed in the contract, and without the consent of defendant, and that the defendant was thereby damaged, then the plaintiff can only recover the reasonable value of his services over and above such damage; and if you believe, from the evidence, that such services were reasonably worth no more than the amount of such damage, then you should find for the defendant.

§ 17. **Must Demean Himself Respectfully.**—The court instructs the jury, that when a person is employed by another he must,

in his intercourse with his employer and those having control of his business, and with those doing business with such employer, abstain from all vulgarity and obscenity of language and conduct, if required to do so, and must be respectful and obedient to the reasonable commands of his employer and those having control of his business. And a failure in any of these requirements would be good ground for discharging such person before his term of employment expires. *Hamlin et al. vs. Race*, 78 Ill., 422; *Brink vs. Fay*, 7 Daly (N. Y.), 562.

§ 18. **Leaving on Account of Sickness.**—The jury are instructed, that even if they believe, from the evidence that the work sued for in this case was done under a special contract, by which the plaintiff agreed to work for a fixed and specified time, and that plaintiff left defendant's employ before the expiration of that time, still, if the jury further believe, from the evidence, that plaintiff was compelled to so quit work on account of sickness (or on account of sore eyes), then he would be entitled to recover for the time he actually did work at the agreed price, if the jury find, from the evidence, that there was an agreed price between the parties; and if the jury find there was no agreed price, then what such labor was reasonably worth. *Hubbard vs. Belden*, 27 Vt., 645; *Green vs. Gilbert*, 21 Wis., 395.

§ 19. **Discharged or Compelled to Leave, etc.**—The court instructs the jury, that while the law is that a person who engages to labor for another for a specified period, at a given price, has no right to recover for his work, etc., unless he performs his entire contract, or is excused therefrom by the employer, or is, in some manner, justified in quitting before the expiration of the time; yet if he is prevented from performing his contract by the employer, or is discharged from his employment, or is, from ill-usage, compelled to abandon the service, he may then recover what his labor, actually performed, will amount to at the contract price. *Angel vs. Hanna*, 22 Ill., 429; *Mitchell vs. Scott*, 41 Mich., 108; *Webb vs. U. M. L. Ins. Co.*, 5 Mo. App., 51.

§ 20. **Discharge without Good Cause—Measure of Damages.**—That when one person hires another to work for him for a

definite, fixed time, at an agreed price for the whole time, or at so much per month, the employer cannot legally discharge the workman without his consent, or without some good and reasonable cause, until the expiration of such time; and if he does do so he will still be liable to the workman for the full amount of his wages for the whole time covered by the original agreement, except that in case the workman earns anything, or by reasonable exertion and effort might have earned something during the unexpired portion of the time, then the employer will be entitled to a credit for the sum so earned, or that might have been earned, by the use of reasonable effort and diligence directed to that end. *Fowler vs. Armour*, 24 Ala., 194; *King vs. Steiren*, 44 Penn. St., 99; *Ricks vs. Yates*, 5 Ind., 115.

If you believe, from the evidence, that on or about, etc., the defendant employed the plaintiff to make cheese for him during the cheese-making season of A. D. 18—, and agreed to pay him for his services at the rate of \$—— per day, and that afterwards the plaintiff commenced to work for defendant under said contract, and that, before the end of such season, defendant discharged plaintiff from such employment without the fault of the plaintiff, and against his will, then the plaintiff is entitled to recover, at the rate of \$—— per day, for all that portion of the unexpired term after said discharge, during which, the evidence shows, he was necessarily unemployed by reason of such discharge, if you believe, from the evidence, that he was during any portion of said time necessarily unemployed by reason of such discharge.

§ 21. **Workman Must Avoid Unnecessary Damage.**—The court instructs the jury, that when a person hired to work for another for a fixed and definite time is wrongfully discharged by his employers before the time expires, he must use all reasonable means and efforts to find other employment during the unexpired time covered by the contract, so as to avoid unnecessary damage to himself by reason of such discharge. The object of the law in such cases is to pay the workman for the labor performed by him, and also to compensate him for any damage resulting to him from such discharge, and

which could not be avoided by reasonable effort on his part. *Hearne vs. Garrett*, 49 Tex., §19.

§ 22. **Services by a Member of the Family.**—The court instructs the jury, that while it is the general rule of law, that where one renders services for another, which are accepted by the other, the law will imply a promise to pay for such services; yet, if such services are rendered by one who is a member of the family, receiving support therein as such, then no such implication arises; nor can a recovery be had for services so rendered, except upon evidence, showing a promise to pay for the same, or such facts and circumstances as lead the jury to believe, from the evidence, that it was understood by the parties that the services were to be paid for. *Thorp vs. Bateman*, 37 Mich., 68; *Smith vs. Johnson*, 45 Ia., 308; *Sprague vs. Waldo*, 38 Vt., 139; *Davis vs. Goodenow*, 27 Vt., 715; *Hays vs. McConnell*, 42 Ind., 285.

If you believe, that during the time in question, the plaintiff was living in defendant's family as a member thereof, that he was clothed and fed by defendant, that he was cared for in sickness and in health by other members of defendant's family, and in all respects treated as a member of the family, then the law will not imply a promise on the part of the defendant to pay for the services rendered during that time, and in such case he should not recover for such services; unless you further believe, from the evidence, that defendant has promised to pay for the same, or unless the facts and circumstances proved lead you to believe, from the evidence, that there was an understanding between the parties that plaintiff was working for wages.

If you believe, from the evidence, that plaintiff was a member of defendant's family during the whole of the time for which the services in question are charged, and was treated and cared for the same as the other members of his family, then there is no implied promise raised to pay for any services he may have performed, simply from the fact that defendant accepted the services and received the benefit thereof.

§ 23. **Stranger a Member of the Family.**—If the jury believe, from the evidence, that the plaintiff worked for defendant, and

that his time and labor were reasonably worth more than his board and washing, then the plaintiff is entitled to recover what his time and services were reasonably worth, over and above what he has received or been paid, if anything, as shown by the evidence; unless the evidence further shows that the plaintiff agreed to do the work for his board and washing, or that there was some other special contract between the parties fixing the price of the labor. *Wells vs. Perkins*, 43 Wis., 160; *Sword vs. Keith*, 31 Mich., 247.

If you believe, from the evidence, that the plaintiff performed labor for the defendant for which he has not been paid, and that such labor and services were reasonably worth more than the price of his board and washing, then, before the defendant can avail himself of the defense that plaintiff agreed to work for his board and washing, the defendant must prove the existence of such a contract by a preponderance of evidence. And if you find that the evidence bearing upon this point is in favor of the plaintiff, or that it is equally balanced, then you should allow the plaintiff what his services were reasonably worth, over and above what he has had, as shown by the evidence.

§ 24. *Services of Child.*—The court instructs the jury, that although a child may be over age, still, as long as the relation of parent and child continues to exist the same as before he became of age, the law raises no implied promise to pay for the services of the child. *Miller vs. Miller*, 16 Ill., 296; *Hart vs. Hess*, 41 Mo., 441; *Wells vs. Perkins*, 43 Wis., 160; *Adams vs. Adams*, 23 Ind., 50; *Smith vs. Smith*, 30 N. J. Eq., 564.

If you believe, from the evidence, that the plaintiff continued to reside with his father after becoming of age, and was treated as a member of the family the same as before coming of age, then, to entitle him to recover for services performed during that period of time, you must believe, from the evidence, that at the time the services were rendered, it was expected by both parties that he should be paid for such services, or else that the circumstances were such as to reasonably justify the plaintiff in expecting pay for his services.

If you believe, from the evidence, that when the services

in question were performed, the plaintiff lived with his father, the same as his other children did, and apparently the same as he had done before coming of age; then to entitle him to recover, it is incumbent upon the plaintiff to prove, by a preponderance of evidence, an express hiring or promise to pay, or circumstances from which such hiring or promise may reasonably be inferred. *Steel vs. Steel*, 12 Penn. St., 64; *Hiblish vs. Hiblish*, 71 Ind., 27.

Ordinarily when one person does work for another who knowingly permits the work to be done for him and he receives the benefit thereof, the law raises a presumption that the laborer is to be paid for his labor, but there is no such presumption between father and son while living together in the same family and one does work for the other.

If you believe, from the evidence, that the plaintiff was living with his father as a member of his father's family when the work in question was done, then it is not enough that the plaintiff intended or expected to be paid for his labor—this intention or expectation must have been mutual. It is not necessary that there should have been any express contract in so many words between the parties, but besides the mere doing of the work under the direction of the father, in order to warrant a verdict for the plaintiff, the jury must believe, from the evidence, that when the work was done there was an expectation of receiving pay on the part of the plaintiff and an intention to pay on the part of the father. *Hiblish vs. Hiblish*, 71 Ind., 27.

§ 25. **When Promise may be Inferred.**—If the jury believe, from the evidence, that the plaintiff, after becoming of age, and during the time in question, was treated differently from the other children of the family, and did the work of a servant, and was treated as such, then these are circumstances which the jury may consider, with all the other evidence in the case, in determining whether the parties expected and understood that compensation should be made for plaintiff's labor and services.

§ 26. **Emancipation of Minor.**—A father, by agreement with his minor child, may relinquish to the latter the right which

he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and he will then have no right to demand those wages, either from the employer or from the child. *Monaghan vs. School Dist., etc.*, 38 Wis., 100.

You are instructed, that while it is in general true that a father is entitled to the services and earnings of his son, until he arrives at the age of twenty-one years, still, the father may emancipate his minor son, and by agreement with him relinquish the right which he would otherwise have to the son's services and earnings. And this the father may do, although he is insolvent at the time. *Wambold vs. Vick*, 50 Wis., 456.

If you believe, from the evidence, that A. B., the son of the plaintiff, made a contract upon his own account with the defendant, by which he agreed to work for the defendant from, etc., and defendant was to pay him, etc., and that the work for which this suit is brought was done by the said A. B. under said contract, and if the jury further believe, from the evidence, that such contract for services by the said A. B. was made with the knowledge and consent of the said plaintiff, or that the plaintiff knew of the existence of such contract while the work was progressing, and did not repudiate the contract or notify the defendant of his objection thereto, then the son was entitled to receive his own earnings, and a payment to the son would be a good payment. *Burdsall vs. Waggoner*, 4 Col., 261.

§ 27. **Minor Can only Disaffirm Contract after Majority**—(*By Statute*).—By the laws of this state a minor is bound by his contracts unless he disaffirms them within a reasonable time after attaining his majority; disaffirmance before majority is of no effect. If a minor renders personal services under a contract, and accepts payment for them according to the contract, he cannot maintain an action by his next friend to recover again. *Murphy vs. Johnson*, 45 Ia., 57; *Jones vs. Jones*, 46 Ia., 466.

§ 28. **Gratuitous Labor**.—That while the law will in general hold a party for whom work has been performed, with his knowledge and consent, liable to pay for the same, yet a party

is under no obligation to pay for work done by one who volunteers to do it without pay, or as a gratuity; and the fact that such work has been beneficial to the party for whom it was done, creates no obligation to pay for it, if, at the time it was being done, it was understood by the parties to be gratuitous.

If you believe, from the evidence, that the plaintiff made his home at defendant's house during the time for which he claims pay for his services, and that he did not, at that time, intend to charge the defendant for the services he rendered, and both the parties regarded the same as a donation, or as an equivalent for living at defendant's house, then he cannot recover for such services in this suit. *Broughton vs. Smart*, 59 Ill., 440; *Morris vs. Barnes*, 35 Mo., 412.

Labor done, and services rendered by one person for another, without the knowledge or request of the person for whom the work is done or service rendered, no matter how meritorious or beneficial to the latter, afford no ground of action in favor of the person doing the work, or rendering the service. *Bartholomew vs. Jackson*, 20 John., 28.

And in this case, though you may believe, from the evidence, that the plaintiff rendered services which were of value and beneficial to the defendant in saving his crops, still, if you further believe, from the evidence, that such services were rendered without the knowledge or request of the defendant, and that he has never agreed to pay for the same, then the plaintiff cannot recover for such services. *Coe vs. Wager*, 42 Mich., 49.

§ 29. **Agreed Price Must Govern.**—If the jury believe, from the evidence, that the plaintiff rendered the services for the defendant, as claimed and sued for in this case, at an agreed price, and that he has not been fully paid for the same, then the jury should render a verdict in favor of the plaintiff for such an amount as the services actually rendered would come to at the stipulated price, less such an amount as the jury believe, from the evidence, has been paid thereon.

§ 30. **Contract, Presumed to Continue, When.**—The court instructs the jury, that where a person enters the employ of

another under a special contract, fixing the time of service and the price to be paid therefor, and he continues in such employment after the term has ended, without any new contract or agreement, he will be considered as holding under the original contract, so far as the price of his labor is concerned. *G. & B. S. Mch. Co. vs. Bulkley*, 48 Ill., 189; *Vail vs. N. J., etc., Co.*, 32 Barb., 564; *Ranck vs. Albright*, 36 Penn St., 367.

If you believe, from the evidence, that there was no contract between plaintiff and defendant that plaintiff should work for defendant for any definite period of time, you should find for the plaintiff for the time he did work, if any, at the rate per month agreed upon, if you find, from the evidence, that any price was agreed upon between the parties.

§ 31. **Evidence of Reasonable Worth.**—If the jury believe, from the evidence, that the plaintiff did the work in question, as claimed, and that there was no special contract as to the price, then, in coming at the value of the services, the jury should take into account the nature of his employment, the kind of service required of him, and the degree of care and attention bestowed by him on the defendant's affairs, so far as these things have been shown by the evidence, if they do so appear.

If, in this case, you find for the plaintiff, and you believe, from the evidence, that no special price was agreed upon, then, in arriving at the value of the services, you should consider the means of knowledge of such value possessed by the several witnesses who have testified in relation to such value. Those witnesses who helped to do the work, if any such are shown by the proof, all things being equal, would generally afford better and more reliable evidence of such value than those who speak from theory or general knowledge only, especially if the evidence shows that they never did such work or saw it done.

§ 32. **Burden of Proof of Payment.**—The jury are instructed, that the burden of proof as to any payment claimed to have been made to the plaintiff for services rendered, is upon the defendant. And in case of a conflict of testimony as to such

payments, the rule of law is, that if the weight of evidence against the payment exceeds, or even only equals the weight of evidence in favor of their having been made, then the jury should consider such payments not proved.

§ 33. **Offer to Compromise.**—The jury are instructed, that the plaintiff is in no manner bound by any offer that he may have made to accept \$—— in settlement of his claim; provided the jury believe, from the evidence, that such offer was made solely for the purpose of bringing about an amicable settlement with defendant, or by way of compromise; nor in such case should such offer be regarded as an admission that no more than that sum was due. *Monell vs. Burns*, 4 Denio, 121.

§ 34. **Effect of Pleading Set-Off.**—The court instructs the jury, that the defendant has pleaded in this case a plea of set-off, accompanied by a bill of particulars, in which he has charged the plaintiff for board and clothes, etc., during the entire period of time in question, and the fact of pleading such plea and making such charges are circumstances proper to be taken into consideration by the jury, together with all the evidence in the case, in determining whether or not it was understood by defendant at the time that plaintiff was performing the services in question without any expectation of pay therefor.

The court instructs you, that the defendant has pleaded in this case non-assumpsit and set-off; that by thus pleading the defendant does not admit the contract relied upon by the plaintiff; an implied contract as well as a special contract is denied by the plea of non-assumpsit, and the plaintiff is required to prove his case, by a preponderance of the evidence, before he is entitled to recover, notwithstanding the plea of set-off; and unless you find the greater weight of evidence in favor of the plaintiff's claim, you should find for the defendant.

One promise is a sufficient consideration to support another promise, and where a person does an act beneficial to another, or agrees to do so, that forms a sufficient consideration to support an agreement to pay for the same.

§ 35. **Written Contract Varied by Parol.**—A contract under seal may be charged by a subsequent verbal agreement to pay an additional sum for the same work and materials mentioned in the agreement. And in this case, if the jury believe, from the evidence, that there was a subsequent verbal agreement between the parties, varying the terms of the written agreement, and that the work in question was done in compliance with the latter agreement, it will be binding between the parties. *Cook vs. Murphy*, 70 Ill., 96; *Seaman vs. O'Harra*, 29 Mich., 66.

CHAPTER L.

GENERAL INSTRUCTIONS IN CRIMINAL CASES.

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NOTE.—The rules already given under the head of “Credibility of Witnesses—Weight of Testimony,” apply, in the main, equally to civil and criminal suits. The following rules, relating to degree of proof and weight of evidence, apply more especially to criminal prosecutions.

§ 1. **Presumption of Innocence—Degree of Proof.**—The court instructs the jury, that, in this case, the law raises no presumption against the prisoner, but every presumption of the law is in favor of his innocence; and, in order to convict him of the crime alleged in the indictment, or of any lesser crime included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the prisoner the benefit of such doubt, and acquit him. *Snyder vs. State*, 59 Ind., 105.

§ 2. **Every Allegation Must be Proved.**—The court instructs the jury, that it is incumbent upon the prosecution to prove every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendant; the law presumes him innocent of the crime with which he is charged until he is proven guilty beyond a reasonable doubt by competent evidence. And if the evidence, in this case, leaves upon the minds of the jury any reasonable doubt of defendant's guilt, the law makes it your duty to acquit him.

§ 3. **Prisoner Entitled to Every Reasonable Hypothesis.**—The defendant is entitled to every presumption of innocence compatible with the evidence in the case, and if it is possible to account for the death of the deceased upon any reasonable hypothesis other than that of the guilt of the defendant, then

it is your duty to so account for it, and find the defendant not guilty.

§ 4. **Probability not Sufficient.**—The court instructs the jury, that in criminal cases, even where the evidence is so strong that it demonstrates the probability of the guilt of the party accused, still, if it fails to establish, beyond a reasonable doubt, the guilt of the defendants, or of one or more of them, in manner and form as charged in the indictment, then it is the duty of the jury to acquit any defendant or defendants, as to whose guilt they entertain such reasonable doubt.

§ 5. **Preponderance of Evidence not Sufficient.**—That, in law, the accused is always presumed to be innocent until his guilt is established by evidence; and to authorize a conviction, such guilt must be established beyond a reasonable doubt—a mere preponderance of evidence is not sufficient.

§ 6. **Crime Must be Proved Beyond a Reasonable Doubt.**—The court instructs the jury, that before a conviction can be rightfully claimed by the people, in this case, the truth of every material averment contained in the indictment must be proved to the satisfaction of the jury, beyond any reasonable doubt.

That, as a matter of law, the defendants are presumed to be innocent of the crime charged in the indictment until such time as the guilt of the parties charged is proved, as alleged, by competent evidence, beyond any reasonable doubt. *Bressler vs. The People*, 117 Ill., 424.

§ 7. **All the Evidence Should be Considered.**—That in order to fairly determine whether the defendants are proven guilty of the crime of (*burglary*), in manner and form as charged in the indictment, beyond any reasonable doubt, as the law requires, the jury should take into consideration all of the evidence elicited from the defendants' witnesses, as well as that detailed for the prosecution; and if, after a full and dispassionate consideration of all the evidence in the case, you still entertain any reasonable doubt as to whether the defendants, or any of them, committed the crime, in manner and form as charged in the indictment, then you should acquit the person or persons as to whose guilt you entertain such reasonable doubt.

§ 8. **The Guilty Ninety-Nine.**—The policy of our law deems it better that many guilty persons should escape rather than one innocent person should be convicted and punished; so that, unless you can say, after a careful consideration of all the evidence in the case, that every material allegation of the indictment is proved beyond a reasonable doubt, you should find the defendant not guilty.

§ 9. **Jury Should Endeavor to Reconcile Testimony.**—The jury are instructed, that in passing upon the testimony of (*defendant's*) witnesses, in this case, they should endeavor to reconcile their testimony with the belief that all the witnesses have endeavored to tell the truth, if they can reasonably do so under the evidence, and if reasonably possible attribute any differences or contradictions in their testimony, if any exist, to mistake or misrecollection, rather than a willful intention to swear falsely.

§ 10. **Want of Motive.**—That when the evidence fails to show any motive to commit the crime charged, on the part of the accused, this is a circumstance in favor of his innocence.

And, in this case, if the jury find, upon careful examination of all the evidence, that it fails to show any motive, on the part of the accused, to commit the crime charged against him, then this is a circumstance which the jury ought to consider in connection with all the other evidence in the case in making up their verdict. *Clough vs. State*, 7 Neb., 320.

§ 11. **Accused under no Obligation to Testify.**—The court instructs the jury, that while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him.

§ 12. **Failure to Testify—No Presumption against Defendant.**—The court instructs the jury, that while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not

create any presumption against him. The jury should decide the case with reference alone to testimony actually introduced before them, and without reference to what might, or might not, have been proved, if other persons had testified.

§ 13. **Testimony of the Accused to be Weighed by the Jury.**—The court instructs the jury, that although the law makes the defendants in this case competent witnesses, still, the jury are the judges of the weight which ought to be attached to their testimony; and, in considering what weight should be given it, the jury should take into consideration all the facts and circumstances surrounding the case, as disclosed by the evidence, and give the defendants' testimony only such weight as they believe it entitled to, in view of all the facts and circumstances proved on the trial. *Bressler vs. The People*, 117 Ill., 441.

The law gives persons accused of crime the right to testify in their own behalf, but their credibility and the weight to be given to their testimony, are matters exclusively for the jury; therefore, in weighing the testimony of the defendants, A B and C D, in this case, you have a right to take into consideration the manner of testifying, the reasonableness or unreasonableness of their account of the transaction, and interest in the result of the case to them, as affecting their credibility. You are not required to receive blindly the testimony of such accused persons as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction.

The jury in criminal cases are not bound to believe the testimony of the defendant any further than it may be corroborated by other credible evidence in the case. *Hirschman vs. The People*, 101 Ill., 568.

In determining the weight to be given to the testimony of the different witnesses, you should take into account the interest or want of interest they have in the case, their manner on the stand, the probability or improbability of their testimony, with all other circumstances before you which can aid you in weighing their testimony. The defendant has testified as a witness, and you should weigh his testimony as you weigh that of any other witness. Consider his interest in the result

of the case, his manner, and the probability or the improbability of his testimony. *Anderson vs. The State*, 104 Ind., 467.

The rule of law which throws around the defendant the presumption of innocence, and requires the state to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty, from just and merited punishment, but is the humane provision of the law, which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime. *Anderson vs. State*, 104 Ind., 467.

§ 14. **Testimony of the Accused Should be Considered by the Jury.**—That the jury have no right to disregard the testimony of the defendant on the ground alone that he is a defendant, and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty; and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case, and if, from all the evidence, the jury have any reasonable doubt whether, at the time of the shooting complained of, the pistol was accidentally discharged, they should give the defendant the benefit of the doubt and acquit him. *Moses vs. State*, 58 Ala., 117; *Nelson vs. Vorce*, 55 Ind., 455; *Bressler vs. People*, 117 Ill., 441.

§ 15. **Circumstantial Evidence Competent, etc.**—The court instructs the jury, that circumstantial evidence is legal and competent in criminal cases; and if it is of such a character as to exclude every reasonable hypothesis, other than that the defendant is guilty, it is entitled to the same weight as direct testimony.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant deliberately and intentionally shot John Mann, in manner and form as charged, and as he was passing along the public highway, and that from the effects of such shooting the said John Mann died, as charged in the indictment, it matters not that such evidence is circumstantial, or

made up from facts and circumstances, provided, the jury believe such facts and circumstances pointing to his guilt, to have been proven, beyond a reasonable doubt, by the evidence. *Schoolcraft vs. People*, 117 Ill., 277.

§ 16. **Circumstantial Evidence Defined.**—The court further instructs the jury, that what is meant by circumstantial evidence in criminal cases, is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the party or parties charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendants, or any of them, beyond a reasonable doubt, then such evidence is sufficient to authorize a jury in finding a verdict of guilty, as to such of the defendants as the jury are so satisfied, beyond a reasonable doubt, from the evidence, are guilty. *Law vs. State*, 33 Tex., 37.

§ 17. **Facts Must all be Consistent with Guilt and Inconsistent with Innocence.**—The jury are instructed, as a matter of law, that where a conviction for a criminal offense is sought upon circumstantial evidence alone, the people must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the accused. 1 Greenl. on Ev., § 12.

In criminal cases, where the prosecution rely upon circumstantial evidence alone for a conviction, it is not enough that all the circumstances proved are consistent with and point to the defendant's guilt. To authorize a conviction upon circumstantial evidence alone, the circumstances must not only all be in harmony with the guilt of the accused; but they must be of such a character that they cannot reasonably be true, in the ordinary nature of things, and the defendant be innocent. *Com. vs. Goodwin*, 14 Gray, 55.

To authorize a conviction on circumstantial evidence alone, the circumstances should not only be consistent with the prisoner's guilt, but they must be inconsistent with any other

rational conclusion, or reasonable hypothesis, and such as to leave no reasonable doubt in the minds of the jury of the defendant's guilt.

§ 18. **Degree of Certainty Required.**—The rule of law is, that to warrant a conviction on a criminal charge upon circumstantial evidence alone, the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and sufficient to exclude all reasonable doubt of the party's guilt. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but be perfectly reconcilable with the supposition of his guilt. *People vs. Padillia*, 42 Cal., 535.

The court instructs the jury, that it is an invariable rule of law, that to warrant a conviction for a criminal offense upon circumstantial evidence alone, such a state of facts and circumstances must be shown as that they are all consistent with the guilt of the party charged, and such that they cannot, upon any reasonable theory, be true and the party charged be innocent. *Beavers vs. State*, 58 Ind., 530; *Block vs. State*, 1 Tex. App., 368.

§ 19. **One Fact Inconsistent with Guilt.**—The jury are instructed, that where the prosecution relies upon circumstantial evidence alone for a conviction, the jury must be satisfied, beyond a reasonable doubt, that the crime has been committed by some one, in manner and form as charged in the indictment; and then they must not only be satisfied that all the circumstances proved are consistent with the defendant's having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion, than that the defendant is the guilty person.

If there is any one single fact proved to the satisfaction of the jury, by a preponderance of evidence, which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.

In order to justify the inference of legal guilt, from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the

accused upon any rational theory, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

§ 20. **Direct Evidence not Required.**—The court further instructs the jury, that, while they must be convinced of the guilt of the defendant, beyond a reasonable doubt, from the evidence, in order to warrant a conviction, still, the proof need not be the direct evidence of persons who saw the offense committed; the acts constituting the crime may be proved by circumstances.

§ 21. **Admission in Criminal Cases—Must be all Taken Together.**—Where the verbal admission of a person, charged with crime, is offered in evidence, the whole of the admission must be taken together; as well that part which makes for the accused, as that which may make against him; and if the part of the statement which is in favor of the defendant is not disproved, and is not, apparently, improbable or untrue, when considered with all the other evidence in the case, then such part of the statement is entitled to as much consideration from the jury as any other part of the statement.

The jury are instructed, that where evidence is given tending to show admissions made by the defendant in a criminal case, the defendant is entitled to have the whole of the statement or admission heard and considered by the jury. But the jury are not obliged to believe, or disbelieve, all of such statement; they may disregard such parts of it, if any, as are inconsistent with the other testimony, or which the jury believe, from the facts and circumstances proved on the trial, are untrue. *Conner vs. State*, 34 Texas, 659; *Roscoe's Crim. Ev.*, 55; *Riley vs. State*, 4 Tex. App., 538; *Eiland vs. State*, 52 Ala., 322; *State vs. Hollenscheit*, 61 Mo., 302.

§ 22. **Confessions Must be Treated Like Other Evidence.**—If the jury believe, from the evidence, that the defendant made the confession, as alleged, and attempted to be proved in this case, the jury should treat and consider such confession precisely as they would any other testimony; and hence, if the jury believe the whole confession to be true they should act upon the whole as true. But the jury may believe part of the

testimony and reject the balance if they see sufficient grounds, in the evidence, for so doing; the jury are at liberty to judge of it like other evidence, in view of all the circumstances of the case as disclosed by the evidence. *Jackson vs. The People*, 18 Ill., 269.

§ 23. **Confession to be Received with Caution.**—The court instructs the jury, that the confessions of a prisoner out of court are a doubtful species of evidence, and should be acted upon by the jury with great caution, and, unless they are supported by some other evidence tending to show that the prisoner committed the crime, they are rarely sufficient to warrant a conviction.

§ 24. **Confession When Corroborated.**—Upon the subject of confessions the court further instructs the jury, that the credit and weight to be given to them depend very much upon what the confessions are; if the crime, itself, as charged, is proved by other testimony, and it is also proved that the defendant was so situated that he had an opportunity to commit the crime, and his confessions are consistent with such proof and corroborative of it, and the witness who swears to the confession is, apparently, truthful, honest and intelligent, then, confessions so made may be entitled to great weight with the jury.

If the jury believe, from the evidence, that the confessions, or admissions, testified to by the witness A. B. as having been made to him by the defendant, were so made, and that they were the spontaneous and voluntary act of the defendant, and if the jury further believe, that such confessions have been corroborated by satisfactory proof that the (*property was stolen*), and that the defendant was so situated that he had an opportunity to commit the crime, then, such confessions and admissions may be entitled to great weight in the minds of the jury; and if the jury believe, from all the evidence, beyond a reasonable doubt, that the defendant is guilty, then they should so find by their verdict.

§ 25. **When Sufficient to Convict.**—If, in this case, a conviction is asked, on the ground of admissions, unsupported by

other evidence, such admissions or confessions should be clear and unequivocal, and such as to convince the jury, beyond a reasonable doubt, of the defendant's guilt.

If the evidence, tending to show admissions of guilt, is sustained by evidence of other facts, then such admissions, even if not unequivocal, should be taken into consideration with all the other evidence in the case, by the jury, and allowed such weight as, in the opinion of the jury, they are entitled to.

§ 26. **Testimony of Accomplice.**—That the witness A. B. is what is known in law as an accomplice; and that, while it is a rule of law that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice, still, a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied, beyond any reasonable doubt, of its truth, and that they can safely rely upon it. Best, Evi., § 171; 1 Greenl. Evi., § 386.

If the jury believe, from the evidence, that the witness A. B. was induced to become a witness, and testify in this case, by any promise of immunity from punishment, or by any hope held out to him, by any one, that it would go easier with him in case he disclosed who his confederates were, or in case he implicated some one else in the crime, then, the jury should take such fact into consideration, in determining the weight which ought to be given to his testimony thus obtained, and given under the influence of such promise or hope.

§ 27. **Fabrication of Testimony.**—The jury are instructed, that if they believe, from the evidence, that the accused believed that the circumstances surrounding him were calculated to awaken suspicion against him, and that he was ignorant of the nature and course of criminal proceedings, and, under such belief, was induced by his friends to fabricate testimony, then, the jury may take these facts into consideration in considering the conduct of the defendant in relation to fabricating such testimony, and in determining his guilt or innocence. *Yoe vs. The People*, 49 Ill., 410.

§ 28. **Contradictory and Inconsistent Statements.**—If the jury find, from the evidence, that the accused, at or about the time of his arrest, made false and contradictory statements, calculated to excite suspicion against him, still, these statements, if they can reasonably be attributed to any other motive or cause than that of a consciousness of guilt of the crime charged in the indictment, and a desire to conceal it, then they should be so attributed and explained, and in such case they should not be regarded as any evidence of guilt of the crime charged.

The court further instructs the jury, that the fact that witnesses disagree in minor points in their recollection and recital of transactions does not necessarily militate against the candor of any of them. It may only indicate a failure of observation or recollection. Jurors have not the right to captiously or unreasonably disregard the testimony of witnesses, but, unless there appears something which indicates a lack of candor or untruthfulness on the part of the witness, the testimony of all the witnesses should receive proper and candid consideration by the jury, in an honest discharge of their sworn duties. *State vs. McDivitt*, 69 Ia., 459.

§ 29. **One Witness Sufficient**—(*Except in Treason or Perjury*).—The court instructs the jury, that the evidence of one credible witness swearing, directly, to any material fact in this case, if uncontradicted by other evidence, or by facts and circumstances proven, is sufficient proof of that fact for the purposes of this trial.

§ 30. **The Precise Crime Charged Must be Proved.**—The jury are further instructed, that if the evidence leaves a reasonable doubt in the mind of the jury whether the defendant is guilty of the precise crime with which he is charged in the indictment, then the jury should find the defendant not guilty; although the evidence may show conduct of no less turpitude than the crime charged, that is not enough to authorize a conviction in this trial. *Stuart vs. The People*, 73 Ill., 20.

§ 31. **Statements of Prosecuting Attorney not Based on Evidence.**—The jury are instructed, that it would be highly improper and wrong for them to regard the statements of the prosecut-

ing attorney that, etc., as entitled to any weight whatever in this case. And this is true of any and all other statements of his that are not based on the evidence in the case, if any such have been made. *Kennedy vs. The People*, 40 Ill., 488.

The court further instructs the jury, that the allusions and references of the prosecuting attorney to the supposed prevalence of crime in the community, should in no way influence or prejudice your minds against the defendant in this case. Your duty is discharged when you have determined his guilt or innocence of the charge contained in this indictment, and there is no other question involved in the case.

§ 32. **Reasonable Doubt Defined.**—The jury are instructed, that the reasonable doubt which entitles an accused to acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is to be deemed to be beyond reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act, without hesitation, in their own most important concerns or affairs of life. 3 Greenlf. on Ev., § 29; *Com. vs. Webster*, 5 Cush., 320.

The court instructs the jury, that in a legal sense a reasonable doubt is a doubt which has some reason for its basis; it does not mean a doubt from mere caprice or groundless conjecture; a reasonable doubt is such a doubt as the jury are able to give a reason for. 3 Greenlf. on Evi., 13th Ed., § 29, n. 2.

The court instructs the jury, that a reasonable doubt, within the meaning of the law, is such a doubt as would cause a reasonable, prudent and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matter charged or alleged. *May vs. The People*, 60 Ill. 119.

The court instructs the jury, that in considering this case you should not go beyond the evidence to hunt for doubts, nor should you entertain such doubts as are merely chimerical or based upon groundless conjecture. A doubt, to justify an acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case; and then it must be such a doubt as would cause a reasonable, prudent and considerate man to hesitate and pause before acting in the

graver and more important affairs of life. If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt. *Miller vs. The People*, 39 Ill., 457; *People vs. Finley*, 38 Mich., 482; *Spies vs. People*, 12 N. E. Rep., 905; *State vs. Pierce*, 65 Ia., 85.

The term "reasonable doubt," as used in these instructions, means a doubt which has some good reason for it, arising out of the evidence in the case; such a doubt as you are able to find, in the evidence, a reason for; it means such a doubt as would cause a prudent man to pause and hesitate before accepting as true and acting upon any matters alleged or charged in the graver and more important affairs of life. As applied to evidence in criminal cases, it means an actual and substantial doubt, growing out of the unsatisfactory nature of the evidence in the case. It does not mean a doubt which arises from some mere whim or vagary, or from any groundless surmise or guess, and, while the law requires you to be satisfied, from the evidence, of the defendant's guilt, beyond a reasonable doubt, it, at the same time, prohibits you from going outside of the evidence to hunt up doubts upon which to acquit the defendant. In arriving at your verdict, it is your duty to carefully and candidly consider the entire evidence in the case, and in so doing, you should entertain such doubts only as arise from the evidence, and are reasonable, as defined in these instructions. 3 Greenleaf on Evidence, § 29; *Commonwealth vs. Webster*, 5 Cush., 320.

§ 33. **Duty of the Jury to Determine Doubts.**—If, after a careful comparison and candid consideration of all the evidence in the case, you have a doubt of the defendant's guilt, it will then be your duty to determine whether such doubt is reasonable and sufficient in law to acquit the defendant. And, if after applying the law defining such doubts, as laid down in these instructions, you find that the doubt in question is not a reasonable one, then it will not be sufficient in law to acquit the defendant. A doubt to justify an acquittal must be a reasonable one, and it must arise from a careful and candid investi-

gation of all the evidence in the case, and unless the doubt is a reasonable one and does so arise it will not be sufficient in law to authorize a verdict of not guilty.

§ 34. **Reasonable Doubt in Circumstantial Evidence.**—The law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the testimony all together, you are satisfied beyond a reasonable doubt that the defendant is guilty. *Houser vs. State*, 58 Ga., 78; *Jarrell vs. State*, 58 Ind., 293; *State vs. Hayden*, 45 Ia., 11; *Bressler vs. People*, 117 Ill., 422.

§ 35. **Attempt to Escape, How Considered.**—Evidence has been introduced as to an attempted escape from jail by the defendant while in the custody of the sheriff of this county, on this charge. If you find, from the evidence, that the defendant did thus attempt to escape from custody, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of guilt or innocence. *Anderson vs. State*, 4 N. E. R., 63; 104 Ind., 467.

§ 36. **Jury Judges of the Law as well as of the Facts—Illinois.**—“If the jury can say, upon their oaths, that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice; that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths it is their duty to reflect whether from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them the right.” *Schnier vs. The People*, 23 Ill., 17; see, also, *Mullinix vs. The People*, 76 Ill., 211; *Spies et al. vs. The People*, 12 N. E. Rep., 905—122 Ill., 1.

Indiana.—In this case you are the sole judges of the law, and the right to determine the law goes to this extent: that, even if all the facts alleged in the indictment are established by the evidence beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offense, under the laws of this state, and if you determine they do not, you have the right to acquit the defendant. You are not bound by the instructions given you by the court as to the law, but are at liberty to disregard such instructions, if you see fit to do so, and determine the law for yourselves. *Anderson vs. State*, 5 N. E. R., 711.

§ 37. **Proof of an Alibi.**—One of the defenses interposed by the defendants, in this case, is what is known, in law, as an *alibi*, that is, that the defendants were at another place at the time of the commission of the crime, and the court instructs the jury, that such a defense is as proper and as legitimate, if proved, as any other, and all the evidence bearing upon that point should be carefully considered by the jury; and if in view of all the evidence, the jury have any reasonable doubt as to whether the defendants were in some other place when the crime was committed, they should give the defendants the benefit of the doubt, and find them not guilty. *Davis vs. State*, 5 Bax. (Tenn.), 612; *Wiley vs. State*, 5 Bax., 662.

§ 38. **Alibi Need not be Proved beyond a Reasonable Doubt.**—As regards the defense of an *alibi*, the jury are instructed, that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal; it is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged. *State vs. Harden*, 46 Ia., 623; *State vs. Jaynes*, 78 N. C., 504; *Howard vs. The State*, 50 Ind., 190; *State vs. Watson*, 7 S. C., 63.

§ 39. **Burden of Proof—Alibi.**—The defendants claim, as one of their defenses, what is known in law as an *alibi*; that is, at the time the robbery with which they are charged was being committed they were at a different place, so that they could not have participated in its commission.

The burden is upon each defendant to prove this defense for himself, by a preponderance of evidence; that is, by the greater and superior evidence.

The defense of *alibi*, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away or under such circumstances that he could not with any ordinary exertion have reached the place where the crime was committed so as to have participated in the commission thereof.

If the proof of *alibi* fails to show as to either defendant on trial, you will not consider it as to him; but if it does so show as to either, you will give it full consideration as to the defendant of whom it so shows. *State vs. Maher*, 37 N. W. Rep. 2; 2 Bish. Crim. Pro., §§ 29-32; *Mullins vs. The People*, 110 Ill., 45.

The court instructs the jury, as a matter of law, that where the people make out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is on him to make out his defense, and as to an *alibi*; and when the proof is in, then the primary question is (the whole evidence being considered, both that given for the defendant and for the people), is the defendant guilty beyond a reasonable doubt? The law being that when the jury have considered all the evidence, as well that touching the question of the *alibi* as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, then they should acquit—otherwise, not. *Ackerson vs. The People* (Ill.), 16 N. E. Rep., 847.

§ 40. **Doubt as to Defendant or Somebody Else.**—In determining the question as to whether the evidence does point as strongly to the guilt of the (*three*) unknown men testified to by the witnesses, A. and B., as it does to the prisoners at the bar, it is competent for the jury, and, in fact, they should take into consideration the fact, if proven in the case, that a few minutes before the commission of the burglary, the said (*three*) unknown men were near the place where the crime was committed; and also consider whether they did not, then and there, have the same opportunity to commit such crime as the defendants did.

The court instructs the jury, that before they can convict the defendant in this case, it must appear, from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence shows that the defendant or somebody else committed the crime, nor that the probabilities are that the defendant and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendant or some one else is the guilty party. *Lyons vs. The People*, 68 Ill., 271.

If, from a consideration of all the evidence in this case, the jury entertain a reasonable doubt as to whether the offense charged was committed by the defendants or by other persons, the jury should acquit; and the same rule applies as to the question of guilt or innocence of each defendant; that is to say, that if the evidence leaves the jurors in reasonable doubt as to any one defendant, such defendant should be acquitted.

The jury are instructed, that it is a rule of law that although it may be positively proved that one of two or more persons committed a crime, yet if there is any reasonable doubt as to which is the guilty party, all must be acquitted. *Campbell vs. The People*, 16 Ill., 1.

§ 41. **Proof of Identity.**—The court further instructs the jury, that to justify a conviction of the defendants, their identity as the guilty persons must be proved, beyond every reasonable doubt, and the jury are not bound to believe that the witness was able to identify the prisoners with certainty because he swears positively to their identity; and the jury should not so believe, if they themselves are satisfied, from the circumstances proved, that there is a reasonable doubt as to whether the witness was able to and did identify the defendants, or any of them, as the guilty persons.

So far as regards the question of identity of the defendants the court instructs the jury, that if they believe, from the evidence, and the circumstances proved, that there is reasonable doubt whether the witness might not be mistaken as to their identity, then before the jury would be authorized to convict the prisoners the corroborating circumstances tending to establish their identity must be such as, with other testi-

mony, produces a degree of certainty in the mind of the jury so great that they can say and feel that they have no reasonable doubt as to the identity of the defendants.

§ 42. **Good Character Presumed.**—The court instructs the jury, that the character of an accused person is, in law, presumed to be good until the contrary appears from the evidence, and he is under no obligation to prove a good character until his character is, in some manner, attacked, and the jury will not be justified in drawing any inference unfavorable to the defendant, from the fact he has offered no proof as to good character in this case.

§ 43. **Former Good Character Proved.**—If the jury believe, from the evidence, that while the defendant A. resided in the town of C. his general reputation and character for honesty were good, then the presumption of law is, in the absence of proof to the contrary, that that reputation has continued good down to the time of the commission of the offense charged in this indictment. And the said defendant was under no obligation to introduce further proof on the point of good character, unless he saw fit so to do, and his omission to introduce further testimony upon that point should not be regarded by the jury as a circumstance against him, or as tending, in any degree, to prove his guilt in this case.

§ 44. **Omission to Prove Good Character.**—That the law not only presumes that every person is innocent until he is proven to be guilty, but the law also presumes that a person has a good character and reputation for (*honesty*) until the contrary is shown by the evidence; and the jury have no right to consider the omission on the part of the defendants, R. and H., to introduce evidence of good character as a circumstance against them, or as tending to show their guilt in this case. 1 Wharton on Crim. Law, § 637; *State vs. Tozier*, 49 Me., 404; *People vs. Bodine*, 1 Denio, 281.

§ 45. **Proof of Good Character—Effect of.**—The jury are instructed, that in all criminal trials where the prosecution depends upon circumstantial evidence alone, which is not con-

clusive in its character, previous good character on the part of the accused, if proved, is entitled to great weight in favor of innocence.

That upon a prosecution for burglary or larceny, proof of previous good character for honesty, on the part of the party charged, is proper evidence to be considered by the jury, in connection with all the other evidence, in determining the guilt or innocence of the party charged; and if the case is otherwise doubtful, satisfactory proof of previous good character will amount to complete defense.

That where there is a serious conflict in the testimony as to the commission of an offense like that charged in this case, evidence of the previous good character of the defendant, as to such offenses, should be considered by the jury, in connection with all the other evidence given on the trial, in determining whether the defendant would be likely to commit, and did commit, the offense in question. *Kistler vs. State*, 54 Ind., 400.

That in doubtful cases, evidence of good character is conclusive in favor of the party accused; and if, from the evidence, you find that the facts and circumstances proved and relied upon to establish the defendant's guilt are in doubt, or that the intent of the defendant to commit the crime is in doubt, then, if the prisoner has, by evidence, satisfied you that he was a man of good character up to the time of the alleged offense in this case, the presumption of law is, that the alleged crime is so inconsistent with the former life and character of the defendant that he could not have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption, and acquit him.

§ 46. **Proof of Good Character Always Proper.**—The court instructs the jury, that evidence of previous good character is competent evidence in favor of a party accused, as tending to show that he would not be likely to commit the crime alleged against him.

And in this case, if the jury believe, from the evidence, that prior to the commission of the alleged crime the defendant had always borne a good character (*for honesty*) among his acquaintances and in the neighborhood where he lived, then this is a fact proper to be considered by the jury, with

all the other evidence in the case, in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken or have testified falsely or truthfully; and if, after a careful consideration of all the evidence in the case, including that bearing upon his previous good character, the jury entertain any reasonable doubt of the defendant's guilt, then it is their sworn duty to acquit him. *Lee vs. State*, 2 Tex. App., 338; 3 Greenl. Ev., § 25-26; 1 Whart. Crim. Law, § 636, 643; *Stewart vs. The State*, 22 Ohio, 477.

§ 47. **Guilt Proved Notwithstanding Proof of Good Character.**— If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question, as charged in the indictment, it will be your sworn duty, as jurors, to find the defendant guilty, even though the evidence may satisfy your minds that the defendant, previous to the commission of the alleged crime, had sustained a good reputation and character for honesty. *Hirschman vs. The People*, 101 Ill., 575.

The court instructs the jury, as a matter of law, that the defendant has put in evidence his general reputation for honesty and integrity; that such evidence is permissible under the law, and is to be by the jury considered as a circumstance in this case. But the court further instructs the jury, that if, from all the evidence in this case, they are satisfied beyond a reasonable doubt of the guilt of the accused, then it is the duty of the jury to find him guilty, notwithstanding the fact that heretofore the accused has borne a very good character for honesty.

CHAPTER LI.

ACCESSORIES.

- SEC. 1. Accessory defined.
2. Accessory defined—Illinois.
3. Aiding or abetting may be by words or acts.
4. Concert of action need not be by express agreement.
5. Aiding or abetting assault.
6. Aiding or abetting murder.
7. Advising or encouraging, not being present.
8. Aiding or abetting in burglary.
9. Present, but not aiding or assisting.
10. Any one or more may be found guilty.

NOTE.—At common law, persons participating in a crime are either principals or accessories. If the crime is felony, they are alike felons. Principals are such either in the first or second degree. Principals in the first degree are those who are the immediate perpetrators of the act. Principals in the second degree are those who did not with their own hands commit the act, but who were present, aiding and abetting it.

An accessory before the fact is he who, being absent at the time the felony is committed, does yet procure, counsel or command another to commit a felony. In many, if not most, of the states, an accessory before the fact is by statute declared to be in law, as he is in reason, either actually or substantially a principal.

§ 1. Accessory Defined.—The court instructs the jury, that an accessory is one who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime charged. He who thus aids, abets, assists, advises or encourages, is considered a principal and punished accordingly. Iowa Code, § 4314; *State vs. Hessian*, 58 Ia., 68.

§ 2. Accessory Defined—Illinois.—R. S., Ch. 38, § 274.—The court instructs the jury, as a matter of law, that an accessory is he who stands by, and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises, or encourages, shall

be considered as principal and punished accordingly. Every such accessory, when a crime is committed within or without this state, by his aid or procurement in this state, may be indicted and convicted at the same time as the principal, or before or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal. *Coates vs. The People*, 72 Ill., 303.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant deliberately and intentionally shot * * * with a loaded revolver, as charged in the indictment, and that the defendant A. B. in any way or manner aided, advised or encouraged such shooting, then the jury should find the defendants both guilty; provided, the jury further find, from the evidence, beyond a reasonable doubt, that such shooting was not necessary, and did not reasonably appear to be necessary to save their own lives, or to prevent them, or either of them, receiving great bodily harm. *Smith vs. The People*, 74 Ill., 144.

§ 3. **Aiding, Advising, etc., may be by Words or Acts.**—The court instructs the jury, that the advising or encouraging that may make one an accessory to crime need not be by words. It may be by words or acts, signs or motions, done or made for the purpose of encouraging the commission of the crime. *Brennan vs. The People*, 15 Ill., 511.

§ 4. **Concert of Action Need not be by Express Agreement.**—The jury are instructed, that while the law requires, in order to find all the defendants guilty, that the evidence should prove, beyond a reasonable doubt, that they all acted in concert in the commission of the crime charged, still it is not necessary that it should be positively proven that they all met together and agreed to commit the crime; such concert may be proved by circumstances; and if, from all the evidence, the jury are satisfied, beyond a reasonable doubt, that the crime was committed by the defendant, and that they all acted together in the commission of the crime, each aiding in his own way, this is all the law requires to make them all equally guilty. *Miller vs. The People*, 39 Ill., 457.

§ 5. **Aiding or Abetting Assault.**—The court instructs the jury, that the rule of law is that, as to each of the defendants, in order to warrant a verdict of guilty as to him, it must appear, from the evidence, that an assault was committed, in manner and form as charged in the indictment, and that he was present, taking part in the assault, or was aiding and abetting in the same, or that he had advised or encouraged the commission thereof.

And in passing upon the guilt or innocence of each one of the defendants, if the evidence fails to establish, beyond a reasonable doubt, that he was present, taking part in, or aiding or abetting the assault, or if he was not present, that he had advised or encouraged the same, then as to such defendant, the verdict should be not guilty.

If the jury believe, from the evidence, beyond a reasonable doubt, that any one or more of the defendants attempted to kill or murder the said A. B., in manner and form as charged in the indictment, and that any one or more of the other defendants now on trial, with the intent only to commit an assault and battery, and not to murder the said A. B., joined in the attempted assault, and combined with those who did so intend to murder, to assault and beat the said A. B., then all who so combined and aided in the attempt to commit said assault would be guilty of an assault with an intent to kill and murder, in manner and form as charged in the indictment.

§ 6. **Aiding or Abetting Murder.**—The court further instructs the jury, that if they believe, from the evidence, beyond a reasonable doubt, that the said A. B. was unlawfully killed, with malice aforethought, in manner and form as charged in the indictment, and that the defendant C. D. was present, and in any manner aided, abetted or assisted in such killing, or advised or encouraged the same, then the jury should find, him guilty, although they may believe, from the evidence, that some other person fired the fatal shot (struck the fatal blow), and although no motive on his part for the killing has been shown.

If the evidence, facts and circumstances, proved on the trial, convince the jury, beyond a reasonable doubt, that the said A. B. was unlawfully killed, with malice aforethought, in manner

and form as charged in the indictment, and that the defendant C. D. was present, and in any manner aided, assisted or abetted such killing, then the jury should find him guilty, though there was no human eye witnessed the fact of such killing.

§ 7. **Advising and Encouraging, not Being Present.**—The court instructs the jury, that if they believe, from the evidence, beyond a reasonable doubt, that any one or more of the defendants is guilty of the offense charged in the indictment, and that any other of the defendants stood by at the time and aided, abetted or assisted in the commission of the crime, or who, not being present, had advised or encouraged the commission of the same, then such other persons, so aiding, abetting, advising or encouraging, are, in law, guilty as principals, and the jury should so find by their verdict. *Sharp vs. State*, 6 Tex. App., 650; *State vs. Hamilton*, 13 Nev., 386; *State vs. Maloy*, 44 Ia., 104.

§ 8. **Aiding and Abetting in Burglary.**—If the jury believe, from the evidence, beyond a reasonable doubt, that a burglary was committed, as charged, and that the defendant A. B. was standing by, aiding, abetting, assisting or encouraging the commission of the crime, then it is the duty of the jury to find him guilty, in manner and form as charged in the indictment.

§ 9. **Present, but not Aiding or Assisting.**—Though the jury may believe, from the evidence, that the said A. B. was murdered at the time and place in question, and that the defendant C. D. was present at the time of such murder, still, if the jury are not satisfied, from the evidence, beyond a reasonable doubt, that the said C. D. was previously aware of the purpose to commit such murder, or that he, in some way, aided, abetted or assisted in the killing, or advised or encouraged it, then they should find the said C. D. not guilty, though they further believe, from the evidence, that he subsequently failed to disclose the killing, or even concealed the same. *State vs. Maloy*, 44 Ia., 104.

§ 10. **Any one or More may be Found Guilty.**—The court instructs the jury, that if, from a consideration of all the facts and circumstances detailed in evidence, the jury believe, from the evidence, beyond a reasonable doubt, that the defendants, or any one or more of them, are guilty of the crime charged in the indictment, they should so find, by their verdict, as to each particular defendant. It is not necessary to find all the defendants guilty in order to find any one or more of them guilty.

CHAPTER LII.

ASSAULTS.

ASSAULT WITH INTENT TO COMMIT MURDER.

- SEC. 1. Assault defined.
2. Must be such as would be murder if death had ensued.
3. Person presumed to have intended the natural consequences, etc.
4. Reckless shooting—Wanton injury.
5. The intent must appear.
6. The intention to kill must exist.
7. Circumstances showing deliberation.
8. The intent may be proved by circumstances.
9. A blow in the heat of passion, etc.
10. Incapable of forming intent from drunkenness.
11. The intent must be proved beyond a reasonable doubt.
12. The verdict may be for an assault with a deadly weapon.
13. May find defendant guilty of assault with intent to commit manslaughter.

ASSAULT WITH A DEADLY WEAPON.

14. Assault with a knife.
15. Proof of instrument of the same kind sufficient.
16. What sufficient to prove.
17. What necessary to prove.
18. No crime without intent.
19. Presumption of intent may be rebutted.
20. A deadly weapon defined.

ASSAULT WITH INTENT TO COMMIT MURDER.

§ 1. Assault Defined.—The court instructs the jury, that an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. And in this case, unless the jury believe, from the evidence, beyond a reasonable doubt, that the defendant made an attempt to shoot the witness A. B. with a loaded pistol or revolver, intending to shoot him, and with a then present ability to shoot him, then the jury should find the defendant not guilty.

§ 2. **Must be Such as Would be Murder if Death had Ensued.**—In order to justify a verdict of guilty of the crime of an assault with intent to commit murder, the facts and circumstances proved in the case must be such that if death had resulted from the shooting, the jury would have found the defendant guilty of willful murder. *King vs. State*, 21 Ga., 220; *State vs. Malcomb*, 8 Ia., 413; *Sharp vs. State*, 19 Ohio, 379.

§ 3. **Presumed to Intend the Natural Consequences, etc.**—The jury are instructed, that the natural and probable consequences of every act deliberately done by a person of sound mind, are presumed to have been intended by the author of such act. And if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant did shoot the said A. B., as charged in the indictment, and that the natural and ordinary consequences of such shooting would be the death of the said A. B., then the presumption of law is that the defendant did shoot the said A. B. with intent to kill him; and if the shooting was done with malice aforethought, either expressed or implied, as explained in these instructions, the jury should find the defendant guilty of an assault with an intent to commit murder.

§ 4. **Reckless Shooting—Wanton Injury.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant pointed the gun at the said A. B., and discharged the same, either with malice aforethought, or with a reckless and total disregard of human life, and that the use of the said weapon, as used by the said defendant, was likely to kill the said A. B., then the said defendant is guilty of an assault with an intent to commit murder.

§ 5. **Intent Must Appear.**—Before the jury can find the defendant guilty of an assault with intent to commit murder, the jury must believe, from the evidence, beyond a reasonable doubt, that the defendant shot the said A. B. under such circumstances as manifest a deliberate intention unlawfully to take away the life of said A. B.; or else, under circumstances showing that no considerable provocation for the assault existed, or where all the circumstances of the transaction show

an abandoned and malignant heart on the part of the defendant at the time.

Before the jury can convict, under the indictment in this case, they must be satisfied, from the evidence, beyond a reasonable doubt, that the defendant intended to murder the prosecuting witness—that he had this intent at the time of the firing, and that he fired the shot without any reasonable apprehension of receiving from the prosecuting witness any great bodily harm; or else, where there was no considerable provocation, or where all the circumstances show an abandoned and malignant heart. 2 Bish. on Crim. Law., § 759.

§ 6. **Intention to Kill Must Exist.**—The jury are instructed, that in order to convict the defendant of an assault with intent to murder the said A. B., it is necessary for the people to prove that the defendant maliciously and deliberately formed an intention to kill the prosecuting witness A. B., and that with such deliberately formed intention, he attempted to carry such intention into effect, and was only prevented from so doing by some interposition not of his own will; or else, under circumstances showing that there was no considerable provocation for the attack on the said A. B., or where all the circumstances show an abandoned and malignant heart, and this must be established beyond a reasonable doubt; and if the prosecution have failed so to prove these matters, then the jury must acquit the defendant of the offense of an assault with an intent to commit murder. 2 Whar. on Crim. Law, G. 1279; 1 Bish. on Crim. Law, § 492.

§ 7. **Facts Showing Deliberation.**—That to reduce an unlawful killing of a human being from the crime of murder to that of manslaughter, on the ground that it was not done with malice aforethought, it must appear, from the evidence, that it was done under such a sudden impulse of passion as was apparently irresistible, provoked by a serious and highly provoking injury upon the person of defendant, or by an attempt by the deceased to commit a seriously personal injury upon defendant.

And if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, after the (*alleged provoca-*

tion) was given, deliberately went to the house, some—distant, and got his gun, and returned with it, and shot the said A. B., as charged in the indictment, then malice is presumed, unless its presence is rebutted by the other evidence in the case; and the defendant is also presumed to have intended the natural consequences of his acts, and in such case, if death had ensued, it would have been murder, and the jury should find the defendant guilty of an assault with intent to murder.

§ 8. **Intent may be Proved by Circumstances.**—That to constitute the offense charged in this case, the intent alleged in the indictment is necessarily to be proved, but direct and positive testimony is not necessary to prove the intent; it may be inferred from the evidence, if there are any facts proved which satisfy the jury, beyond a reasonable doubt, of its existence. *Roberts vs. The People*, 19 Mich., 401.

If the jury are satisfied, from the evidence, beyond a reasonable doubt, that the defendant at and within this county within the period of, etc., intentionally and unlawfully shot a pistol loaded with powder and leaden ball, at and against the said S. C., then another question for you to determine will be whether or not the defendant, at the time he fired the said pistol, intended to take the life of the said C.; and in determining this question it will be proper for you to consider the distance that the defendant was from C. at the time he fired the pistol, the character of the weapon used, the manner in which it was loaded and used, and whether it was such a weapon as would be likely to take the life of a man at the distance the defendant was from C., used in the manner in which it was used at the time the shot was fired, so far as these matters appear from the evidence.

You may also take into consideration whether it is true that the defendant made any declaration or statement at the time or immediately before the shooting, as to what his intentions were, and also his testimony regarding his intentions at the time of the shooting, and also the testimony regarding the defendant's character and reputation as a peaceable and quiet citizen, and if, after considering all these matters together with all the other evidence in the case, you believe, from the evidence, beyond a reasonable doubt, that the defendant intention-

ally and unlawfully shot the said pistol at and against the said C., with the intention thereby to take the life of the said C., then you should find the defendant guilty.

The jury are further instructed that they may take into consideration whether it is true that the defendant made any declaration or statement at the time, or immediately before the shooting, as to what his intentions were, and also his testimony regarding his intentions at the time of the shooting, if any, and also the testimony regarding the defendant's character and reputation as a peaceable and quiet citizen; and if, after considering all these matters, together with all the other evidence in the case, the jury entertain any reasonable doubt as to whether the defendant intentionally shot the said pistol at or against the said C., or if they entertain any reasonable doubt as to whether the defendant fired the pistol with the intention thereby to take the life of the said C., then the defendant is not guilty of an assault with intent to murder. *Rollins vs. State*, 62 Ind., 46.

§ 9. **Blow in Heat of Passion without Intention to Kill.**—If the jury believe, from the evidence, that at the time of the affray between the parties, a sudden quarrel arose, and that the blow was given in the heat of passion, and without premeditation, and without any intention to kill, then the offense would not amount to an assault with an intent to murder.

§ 10. **Incapable of Forming Intent from Drunkenness.**—The court instructs the jury, that, in this case, in order to warrant a conviction of the defendant, the jury must be satisfied, from the evidence, not only that the defendant made an assault upon the said A. B., as charged in the indictment, but it must also appear, from the evidence, that, at the time he made the assault, he had formed in his own mind a deliberate intention to take the life of the said A. B.; and, if the jury further believe, from the evidence, that at the time of the alleged assault, the defendant was so deeply intoxicated or besotted with drink that he was incapable of entertaining or forming any positive intent to kill the said A. B., then the jury should acquit the defendant of the crime of an assault with intent to commit murder. *Mooney vs. The State*, 33 Ala., 419; *State*

vs. *Garvey*, 11 Minn., 154; *Pigman vs. State*, 14 Ohio, 555; 1 Bishop Crim. Law, § 492; *Pays vs. State*, 5 Tex. App., 35; *Parke vs. State*, 5 Tex. App., 552.

§ 11. **Must be Proved beyond a Reasonable Doubt.**—The jury are instructed, that if they believe, from the evidence in the case, that there is a reasonable doubt as to whether the prisoner, at the time of the shooting, was under reasonable apprehension that the prosecuting witness intended to inflict upon him great bodily harm, and that he fired the shot in self-defense, then the jury must acquit. *Lawlor vs. The People*, 74 Ill., 230.

If the jury have a reasonable doubt, from the evidence in the case, whether the gun was accidentally or intentionally discharged, the defendant is entitled to the benefit of such doubt, and the jury should find the defendant not guilty. *State vs. Connor*, 59 Ia., 357.

§ 12. **Verdict May be for an Assault with a Deadly Weapon.**—The court further instructs the jury, that under the indictment in this case, they may find the defendant guilty of an assault with intent to murder, or guilty of an assault with a deadly weapon, with intent to commit a bodily injury, when no considerable provocation appears, or when the circumstances of the assault show an abandoned and malignant heart, and if, after a full and careful consideration of all the evidence, the jury have a reasonable doubt, whether the defendant is guilty of an assault with an intent to kill, but do believe, from the evidence, beyond a reasonable doubt, that defendant is guilty of an assault with a deadly weapon, and with intent to do great bodily injury upon the person of the said A. B., where no considerable provocation appears, or under circumstances which show an abandoned and malignant heart, then the jury should so find by their verdict.

§ 13. **May Find Defendant Guilty of an Assault with Intent to Commit Manslaughter.**—If you find, from the evidence, that the defendant, at the time and place charged in the indictment, unlawfully assaulted said Ryan with a pistol, and shot him in the breast, and you further find that said assault was made

upon reasonable provocation, in the heat of blood, but without malice, and without legal excuse, and with the intent to kill, then you would be justified in finding the defendant guilty of an assault with intent to commit manslaughter. *State vs. White*, 45 Ia., 325; *State vs. Connor*, 59 Ia., 357.

ASSAULT WITH A DEADLY WEAPON WITH INTENT, ETC.

§ 14. **Assault with a Knife Charged.**—If the jury believe, from the evidence in this case, that the defendant made an assault upon the said A. B., with any sharp, deadly weapon, capable of producing a dangerous cutting wound, in manner and form as charged in the indictment, then the jury should find the defendant guilty.

§ 15. **Proof of Instrument of the Same Kind, Sufficient.**—It is immaterial, in this case, whether the alleged injury was inflicted with a knife, or not, provided the jury believe, from the evidence, beyond a reasonable doubt, that the defendant made an assault upon the said A. B., with some sharp, cutting instrument, capable of inflicting a dangerous cutting wound, and of doing great bodily injury, with intent to inflict upon the person of the said A. B. a bodily injury, without any considerable provocation therefor, or under circumstances showing a malignant heart, in manner and form as charged in the indictment, for in such case the jury should find the defendant guilty. *Roscoe's Crim. Ev.*, 705; 2 *Whar. on Crim. Law*, § 1059.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant did make an assault upon the said A. B., with a deadly weapon, in manner and form as charged in the indictment, and that there was no considerable provocation given for such assault, or that the circumstances of the assault showed an abandoned and malignant heart on the part of the defendant, at the time, then the jury should find the defendant guilty.

§ 16. **What Sufficient to Prove.**—That all that is necessary for the people to prove in this case, in order to warrant a conviction, is enough to satisfy the jury, from the evidence,

beyond a reasonable doubt, that the defendant within—— years before the finding of this indictment, within the county of, etc., made an assault upon the person of the said A. B., with a revolver, loaded with powder and ball; that the same was then and there a deadly weapon, and that such assault was made with intent to inflict, upon the person of the said A. B., a bodily injury, when no considerable provocation appeared, or when the circumstances of the assault showed an abandoned and malignant heart on the part of the defendant, at the time.

§ 17. **What Necessary to Prove.**—The court instructs the jury, that to authorize a conviction in this case every material allegation in the indictment must be proved, beyond any reasonable doubt. Among the material allegations in this indictment are: 1st. An assault with a deadly weapon. 2d. That the deadly weapon was a knife, or some other weapon capable of producing a wound similar to that of a knife. 3d. That the assault was made upon the said A. B. with intent to inflict upon him a bodily injury. 4th. That there was no considerable provocation for the assault, or that it was made under circumstances showing an abandoned or malignant heart.

If the evidence fails to establish either one of these essential elements of the offense charged, beyond a reasonable doubt, then it will be the duty of the jury to acquit the defendant.

In this case it is incumbent upon the prosecution to prove not only that an assault was made, as charged in the indictment, but also that the assault was made with the intent therein charged.

§ 18. **No Crime without Intent.**—A criminal intent, as explained in these instructions, is always necessary to constitute a crime, and when such criminal intention does not appear, from all the facts and circumstances proved on the trial, then the act complained of cannot be deemed a crime. Misadventure or accident, when the circumstances rebut the presumption of criminal intention and of criminal negligence, as explained in these instructions, are not deemed, in law, criminal, however injuriously they may affect persons or property. And, in this case, if the jury believe, from the evidence, that while the defendant and the prosecuting witness were strug-

gling together, the pistol in question was discharged, accidentally, then the jury should find the defendant not guilty.

In this case, if the prosecution has failed to establish, beyond a reasonable doubt, that the defendant intended to use, and did use, the pistol in question, at the time of the difficulty, for the purpose of inflicting an injury upon the said A. B., in manner and form as charged in the indictment, or with an intent to do him a bodily injury, the jury should acquit the defendant.

§ 19. **Presumption of Intent may be Rebutted.**—The court instructs the jury, that intent is the gist of all crimes, and although the law presumes that a person intends the natural results of his own acts, yet such presumption may be rebutted by the circumstances of the case; and if the circumstances and surroundings of a case show that there was no malice, and that there was no intention to do what was actually done in the way of inflicting the injury, then there can be no guilt. And if, under the evidence in this case, the jury can reasonably find that the shooting was not intentional, nor the result of criminal negligence, as explained in these instructions, but was the result of accident or misadventure, then the jury should find the defendant not guilty.

§ 20. **A Deadly Weapon Defined.**—The court instructs the jury, that by the words “a deadly weapon,” the law means any weapon which is likely, from the use made of it at the time, to produce death or do great bodily harm. 2 Whar. on Crim. Law, § 944; 1 Bish. on Crim. Law, § 335; *Reynolds vs. State*, 4 Tex. App., 327.

CHAPTER LIII.

BURGLARY.

- SEC. 1. What constitutes burglary.
2. *Prima facie* case—Intent presumed.
 3. Intent must be proved.
 4. What constitutes a breaking.
 5. What constitutes an entry.
 6. May be found guilty of larceny

§ 1. **What Constitutes Burglary.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendants, or either of them, willfully, maliciously, feloniously and forcibly, did break and enter the house of the said A. B. (in the night time), at and within this county, with intent, the goods and chattels of the said A. B., then and there in the said dwelling-house being, feloniously and burglariously to steal, take and carry away, then the jury should find the defendants, or such of them as you so find to have broken and entered such dwelling-house, guilty of the crime of burglary.

If the jury believe, from the evidence, that the defendant broke and entered the dwelling-house of the said A. B., with a felonious intent, in manner and form as charged in the indictment, either by entering through an open window or door, or by raising a window or opening a door, such entering of the house constitutes the crime of burglary.

§ 2. **Prima Facie Case—Intent Presumed.**—If the jury believe, from the evidence, that the defendant was found, on the night in question, in the house of the said A. B., and in the bed-room of the witness E. D., and that he entered the house by raising a window, then such being in the house, unless explained in some way by the evidence, consistently with innocence, will justify the jury in presuming that such entry was made with a felonious intent, in manner and form as charged in the indictment. *Com. vs. Shedd*, 140 Mass., 451.

§ 3. **Intent Must Appear.**—The jury are instructed, that in order to convict the defendant of the crime of burglary, as charged in the indictment, the prosecution must prove to the satisfaction of the jury, and to the exclusion of every reasonable doubt, not only that the defendant willfully, forcibly, maliciously and burglariously broke and entered the house of the said A. B., but also that he broke and entered said house with the intent and for the purpose of stealing the goods and chattels of the said A. B., then and there being in said house; and if the prosecution has failed to prove either of these essential elements of the crime, as charged in the indictment, beyond a reasonable doubt, then the jury should acquit the defendant.

§ 4. **What Constitutes a Breaking.**—The court instructs the jury, that while it is necessary, in order to constitute the crime of burglary, that there should be a breaking and an entry of the building described in the indictment, with the intent therein charged, yet to constitute a breaking into the building it is not necessary that any injury should be done to the building, its doors or windows; such breaking may be actual or constructive. An actual breaking may be by lifting a latch and opening a door, by turning back or opening the lock and opening the door, removing or breaking a pane of glass, or raising a window, or anything by which an obstruction to entering the building by the body, or any part of it, is removed, is a breaking within the meaning of the law. *Timmons vs. State*, 34 Ohio St., 426; *Dennis vs. People*, 27 Mich., 151; *State vs. Reid*, 20 Ia., 413; *Harris vs. People*, 44 Mich., 305.

A constructive breaking is committed when admission is obtained by threats, or by fraud, or false pretenses. *Johnson vs. Com.*, 85 Penn. St., 54.

§ 5. **What Constitutes an Entry.**—And to constitute an entry within the meaning of the law it is not necessary that the whole body should be introduced into the building. It is sufficient if the hand, or even a finger, or any instrument held in the hand is introduced into the building for the purpose and with the intent charged in the indictment. 3 Greenlf. Evi., § 76-77; Roscoe's Crim. Evi., 341-346; 1 Bishop Crim. Law, § 327.

§ 6. **May be Found Guilty of Larceny.**—The jury are instructed, that under an indictment for burglary the accused may be found guilty of a larceny, and in this case, if the jury are not satisfied, from the evidence, that the defendant committed the burglary, as charged in the indictment, still, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant did steal the goods described in the indictment, from the possession of the said A. B., then the jury may, under this indictment, find the defendant guilty of larceny.

CHAPTER LIV.

CRIMINAL CONSPIRACIES.

- SEC. 1. Conspiracy defined.
2. Circumstantial evidence competent proof.
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§ 1. **Conspiracy Defined.**—The court instructs the jury, as a matter of law, that a conspiracy is a combination of two or more persons by some concert of action to accomplish some criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means. *State vs. Rowley*, 12 Conn., 101; *Smith vs. People*, 25 Ill., 17; *Alderman vs. People*, 4 Mich., 414.

§ 2. **Circumstantial Evidence Competent Proof.**—The court instructs the jury, as a matter of law, that the evidence in proof of a conspiracy will, in general, be circumstantial; and, although the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design and to pursue it by common means. *Spies et al. vs. The People*, 12 N. E. Rep., 865; 3 Greenl. on Ev., § 83; *The Mussel-Slough Case*, 5 Fed. Rep., 680; 2 Wharton's Crim. Law, § 1398; 2 Bishop Crim. Pro., § 227; *Tucker vs. Finch*, 66 Wis., 17.

The court instructs the jury, as a matter of law, that if the jury, from the acts of the parties, as proven, and from all the facts and circumstances in evidence, believe, beyond a reasonable doubt, that the defendants did pursue the common object of, etc., as charged in the indictment, and by the same means,

one performing one part, and another another part, so as to accomplish the common object, then the jury would be justified in the conclusion that the defendants were engaged in a conspiracy to effect that object. *Rosc. Crim. Ev.*, 416; *Smith vs. The People*, 25 Ill., 1.

§ 3. **Sufficient Proof of Common Design.**—The court instructs the jury, as a matter of law, that while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action to accomplish the criminal or unlawful purpose alleged in the indictment, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrangement between themselves to effect such purpose; the combination, or common design, or object, may be regarded as proved, if the jury believe, from the evidence, beyond a reasonable doubt, that the parties charged were actually pursuing, in concert, the unlawful object stated in the indictment, whether acting separately or together, by common or different means; providing all were leading to the same unlawful result. *U. S. vs. Cole*, 5 M. C. Lane, 513.

§ 4. **Participants after the Conspiracy is Formed.**—The court instructs the jury, as a matter of law, that all who take part in a conspiracy after it is formed, and while it is in execution, and all who, with knowledge of the facts, concur in the plans originally formed and aid in executing them, are fellow conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them. They commit the offense when they become partners to the transaction, or further the original plan. *People vs. Mather*, 4 Wend., 229.

§ 5. **Not Necessary that the Design Should Succeed.**—The court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their designs. Nor is any overt act necessary to complete the crime; the offense is complete when the confederacy to pursue the common purpose is made. *State vs. Ripley*, 31 Me., 386; *Alderman vs. The People*, 4 Mich., 414; *State vs. Pulte*, 12 Minn., 164; *State vs. Straw*, 42 N. H., 393; *Johnson vs. State*, 3 Tex. App., 590.

The court instructs the jury, as a matter of law, that to constitute the crime of conspiracy it is not necessary that the conspirators should succeed in their design; it is enough if the common design was formed, in manner and form as charged in the indictment, and that any act was done in furtherance of such design by any one of the conspirators. If the conspiracy, charged in the indictment, has been proved to the satisfaction of the jury, beyond a reasonable doubt, then the act of any one of the conspirators, in furtherance of the common design, if proved, will be regarded as the act of all. *State vs. Norton*, 23 N. J. L., 33; *Com. vs. Crowninshield*, 10 Pick., 497.

§ 6. Not Necessary that the Meeting Should Have Been for an Unlawful Purpose.—Though the jury may believe, from the evidence, that when the parties came together upon the occasion in question, they met for some lawful purpose, yet, if the jury further believe, from the evidence, beyond a reasonable doubt, that they then joined in attempting to accomplish the unlawful purpose stated in the indictment, in manner and form as therein alleged, then this would be sufficient evidence of a conspiracy to accomplish such purpose, and it is unnecessary to prove any previous plan or understanding to that effect by the parties. *Lowery vs. State*, 30 Tex., 402; 3 Greenl. Evi., § 93.

§ 7. A Common Design, the Essence of the Charge.—A common design, or purpose, by two or more persons, is the essence of the charge of conspiracy, and this common design must be proved in order to warrant a conviction, either by direct evidence or by the proof of such circumstances as naturally tend to prove it, and sufficient, in themselves, to satisfy the jury of the existence of such common design beyond a reasonable doubt.

§ 8. Conspiracy to Commit an Assault—Defendant's Instructions.—The jury are instructed, that in order to warrant a conviction in this case, the prosecution must prove, beyond a reasonable doubt, that the defendants, or some two of them, are guilty of the crime charged in the indictment.

To authorize a conviction in this case, it is not enough for

the prosecution to prove that an assault was committed; it must further appear, from the evidence, beyond a reasonable doubt, that at least two of the defendants had formed a common design to assault the said A. B., or else took part in such assault, or were present, aiding, abetting, advising or encouraging the same, otherwise the jury should find all the defendants not guilty.

Although the jury may believe, from the evidence, that the defendant A. struck the prosecuting witness at the time in question, still, unless the jury further believe, from the evidence, beyond a reasonable doubt, that one of the other defendants was present, aiding, abetting, advising or encouraging such striking, the striking alone would not constitute a conspiracy.

Although the jury may believe, from the evidence, beyond a reasonable doubt, that one of the defendants threw a stone and struck the prosecuting witness, still, that of itself would not authorize a conviction in this case. To authorize a conviction for conspiracy, it should further appear, from the evidence, to the exclusion of every reasonable doubt, that one or more of the other defendants took part in the difficulty, or in some manner aided, abetted, advised or encouraged the same, and that this was done in pursuance of a common design.

Although the jury may believe, from the evidence, beyond a reasonable doubt, that, upon the occasion in question, there was an assault and battery committed upon the said A. B., by two or more of the defendants, still, this alone would not be sufficient to warrant a conviction for the crime of conspiracy; provided, the jury believe, from the evidence, that each of the parties so assaulting acted upon his own motion and without any reference to the acts or intention of the other defendants, and without any concert of action to accomplish a common design or purpose.

§ 9. Conspiracy to Cheat and Defraud—Illinois.—The court instructs the jury, as a matter of law, that if any two or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or property of another, or to obtain money or other property by false pretenses, or to do any illegal act,

injurious to the public trade, health, morals, police or administration of public justice, or to prevent competition in the letting of any contract by the state or the authorities of any county, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, and every person convicted of conspiracy, at common law shall be imprisoned in the penitentiary not exceeding three years, or fined not exceeding \$1,000.

CHAPTER LV.

HOMICIDE.

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HOMICIDE.

§ 1. **Homicide Generally.**—The jury are instructed that the killing of a human being may be either justifiable, excusable, or felonious and criminal. The killing is justifiable when done in the necessary, or apparently necessary, defense of one's self or family from great bodily harm, attempted to be committed by force. It is excusable when one, in doing a lawful act, by mere accident unfortunately kills another. Such killing, when it is neither justifiable nor excusable, is felonious and criminal, and it may be either murder or manslaughter.

MURDER GENERALLY.

§ 2. **Murder Defined.**—The crime of murder is committed when a person of sound memory and discretion unlawfully kills any reasonable creature in being, under the peace of the state, with malice aforethought, either expressed or implied

Russ. on Cri., 482; Whart. Am. Crim. Law, 356; 3 Greenlf. Evi., § 130.

§ 3. **Express Malice.**—Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof.

§ 4. **Implied Malice.**—Malice is implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. R. S. Ill., Ch. 38, § 140.

§ 5. **Presumption from Killing.**—The jury are instructed, that if the killing of the person mentioned in the indictment is satisfactorily shown by the evidence, beyond all reasonable doubt, to have been the act of the defendants, or either of them, then the law pronounces such killing murder, unless it appears, from the evidence, that circumstances existed excusing or justifying the act, or mitigating it, so as to make it manslaughter, as explained in these instructions. *Brown vs. State*, 4 Tex. App., 275.

§ 6. **Involuntary Killing—Act Naturally Tending.**—The court further instructs the jury, that when an unlawful, unintentional killing of a human being happens in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, the offense will be murder and not manslaughter. 2 Whar. on Crim. Law, 967.

§ 7. **Involuntary Killing—In the Commission of a Crime.**—The court further instructs the jury, that when an unlawful, unintentional killing of a human being happens, or is committed in the prosecution of any felonious intent, as explained in these instructions, the killing will be murder and not manslaughter.

If the jury believe, from the evidence, beyond a reasonable doubt, that at the time of the alleged killing the defendants had entered the house of the deceased, for the purpose of stealing and carrying away any article of personal property therein, and that, in the prosecution of that purpose, or in his

efforts to escape from the house with such property, the defendant struck the deceased and thereby caused his death, then such killing would be murder and not manslaughter, and it would be wholly immaterial whether such killing was intentional or not. 2 Bish. on Crim. Law, 720; *Bissott vs. State*, 53 Ind., 408.

If the jury believe, from the evidence, beyond a reasonable doubt, that the said J. was killed by the defendant, and also, that at the time the defendant was engaged in an attempt to rob the deceased, then the defendant is guilty of murder in the first degree, although he may have had no intention to take the life of the said J. *Monihan vs. State*, 7 Ind., 126.

If the jury find, from the evidence, beyond a reasonable doubt, that at the time of the alleged killing, the defendants, or either of them, made an attack upon the deceased for the purpose or with the intent of feloniously taking from him, by force and against his will, his money, watch or other articles of personal property, and that in the prosecution of that purpose either one of the defendants struck the deceased, and thereby caused his death, in manner and form as charged in the indictment, then such killing would be murder, not only on the part of the one who struck the blow, but also on the part of any one or more of the defendants who were present, aiding or assisting in the original attempt to take the property of the deceased by force or against his will; if the jury find, from the evidence, beyond a reasonable doubt, that either of the other defendants was so present, aiding and abetting; and in such case it would be wholly immaterial whether the blow was struck with the intention of taking the life of the deceased, or only of disabling him.

§ 8. **Blow with Deadly Weapon.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant killed the deceased by striking him on the head with a stick, that the size of the stick was such, that in the hands of a man of ordinary strength, striking with it a violent blow on the head, it was a dangerous weapon, and that the natural consequence of the blow struck by the defendant upon the head of the deceased was to destroy his life, and that his death was caused by such blow, then the jury should find the defendant guilty

of murder; provided, that they further believe, from the evidence, beyond a reasonable doubt, that the blow was struck with malice aforethought, or when no considerable provocation appeared. 2 Whart. on Crim. Law, 971.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant struck the deceased, and knocked him down, in manner and form as charged in the indictment, willfully and intentionally, and without legal excuse or justification, as the same is explained in these instructions, and that the deceased died in consequence of such striking and knocking down, in manner and form as charged in the indictment, then the jury should find the defendant guilty.

And if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant struck the deceased on the head with such a stick, that the violence of the blow knocked him down and produced insensibility, speechlessness and other symptoms of a fatal character, and that, suffering great agony, he died within the space of — or thereabouts, after the blow was given, then these are circumstances which the jury should take into consideration, together with all the other evidence in the case, in determining whether or not the blow was what occasioned the death of the deceased. *Davis vs. The People*, 19 Ill., 74; *Keenan vs. Com.*, 44 Penn. St., 55.

§ 9. **Blow with Deadly Weapon—No Considerable Provocation etc.**—If the jury believe, from the evidence, beyond a reasonable doubt, that on or about, etc, the defendant and deceased met at, etc., within the county, etc., and a quarrel ensued between them, and that the defendant then and there struck the deceased a blow on the head with a dangerous and deadly weapon, as charged in the indictment, without any considerable provocation, or without such provocation as was apparently sufficient to excite sudden and irresistible passion, and that, on the same day, deceased died from the effect of that blow, then the jury should find the defendant guilty of murder, unless the jury further find, from the evidence, that the defendant inflicted the fatal blow in self-defense to save his own life, or to prevent great bodily harm to himself, and under such circumstances that a reasonable person might reasonably apprehend danger to his own life, or great bodily harm to himself.

§ 10. **Words no Sufficient Provocation.**—The court instructs the jury, that no provocation by words only, however opprobrious, will mitigate an intentional killing so as to reduce the killing to manslaughter. 2 Whart. Crim. Law, 970; *Ray vs. State*, 15 Ga., 223; *Rapp vs. State*, 14 B. Monroe, 494; *State vs. Starr*, 38 Mo., 270; *Martin vs. People*, 30 Wis., 216.'

And although the jury may believe, from the evidence, that insulting and opprobrious epithets were used by the deceased to the defendant, yet, if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant immediately revenged himself by the use of a dangerous and deadly weapon, in a manner likely to cause the death of the deceased, and did, thereby, cause his death, then the defendant is guilty of murder, and the jury should so find by their verdict.

§ 11. **Cause of the Death Must be Proved.**—The court instructs the jury, that it is incumbent upon the people to show by proof, beyond a reasonable doubt, that the deceased came to his death by reason of the injury inflicted on him by the pistol ball in question. The people must show, not that such injury was probably the cause of the death, but that it was the efficient and immediate cause of death; and the evidence must establish this fact beyond any reasonable doubt, and if this has not been done the jury should find the defendant not guilty.

§ 12. **Wound not Necessarily Fatal—Death from Neglect.**—The law is, that if one unlawfully inflicts upon another a wound which is not in its nature necessarily mortal, but which might be cured by proper care and surgical treatment, and the person injured neglects to procure such care, or refuses to receive such surgical treatment, and he die of the wound owing to such want of care and treatment, this will not excuse the person inflicting the wound; and if, in such case, the jury further believe, from the evidence, beyond a reasonable doubt, that the injury was inflicted by accused with malice aforethought, as explained in these instructions, and that the deceased died from such wounds, then the jury should find the accused guilty of murder. 3 Greenl. Ev..

§ 139; 2 Bishop Crim. Law, § 679-680; *State vs. Bantley*, 44 Conn., 537; *Williams vs. The State*, 2 Tex. App., 271.

Upon the question, what was the cause of the death of the deceased, the court instructs you that in order to convict the defendant under this indictment, you must be able, from the evidence, to trace the death to the injury alleged to have been inflicted by the defendant and that, too, beyond any reasonable doubt. *People vs. Cook*, 39 Mich., 236.

If you believe, from the evidence, beyond a reasonable doubt, that the gunshot wound was in itself mortal and reasonably calculated from its nature and extent to produce death without any medical or surgical treatment, then it would be no defense that the deceased, under better or different medical treatment, might or probably would have recovered, nor will the law justify a verdict of acquittal, merely upon the ground, if proved, that the medicine administered or the surgical treatment adopted to restore or relieve the deceased in point of fact co-operated with the wound in producing death. It would be enough if you believe, from the evidence, beyond a reasonable doubt, that the gunshot wound would of itself have resulted in death and that it did in fact contribute directly to the death, provided also, you further believe, from the evidence, beyond a reasonable doubt, that the said wound was inflicted with malice aforethought. *People vs. Cook*, 39 Mich., 236; *Bowles vs. State*, 58 Ala., 335.

On the other hand, if you entertain any reasonable doubt as to whether the gunshot wound was mortal in itself, or reasonably calculated from its nature and extent to produce death, and whether death did ensue solely from (morphine poison,) and to which the wound did not materially contribute, then you should acquit the defendant.

If one person inflicts wounds upon another, which are dangerous in themselves, though not necessarily fatal, but which do produce death through a chain of natural causes and effects, uninfluenced by human action, then the wounds are to be regarded as the cause of the death. And in this case if you believe, from the evidence, beyond a reasonable doubt, that the defendant did inflict wounds upon the deceased, in manner and form as charged in the indictment, and that these wounds were dangerous in themselves though not necessarily fatal, and that

these wounds caused congestion of the brain, and that the deceased died of such congestion or that the congestion caused him to expose himself to the inclemency of the weather, and that such exposure was the immediate cause of his death, still, in law, it will be held that the defendant, by inflicting the wounds, caused the death of the deceased. *Kelley vs. State*, 53 Ind., 311.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, with malice aforethought, shot at and hit the deceased with the pistol ball, and thereby inflicted upon him a wound of which he afterwards died, in manner and form as charged in the indictment, then the defendant is guilty of murder, although the jury may further believe, from the evidence, that the wound was not necessarily mortal, and that, with proper care and treatment, the deceased might have recovered. It is sufficient, in such cases, to warrant a conviction of the defendant, if the jury find, from the evidence, beyond a reasonable doubt, that the deceased died from the effect of the wound, and not from his own misconduct or positive ill-treatment of his physician or others.

MURDER—FIRST AND SECOND DEGREE.

§ 13. **Murder Defined.**—The court instructs the jury, that, in this state, whoever kills a human being, with malice aforethought, is guilty of murder.

If a person forms in his mind a purpose, design or intention to unlawfully kill a human being with malice but without premeditation, and he does so kill a human being, then the offense comes within our statute defining murder in the second degree; but if the element of premeditation is also present before the fatal blow is struck, then it is murder in the first degree. *Archie vs. State*, 64 Ind., 56.

§ 14. **Of the First Degree.**—The jury are further instructed, that all murder which is perpetrated by means of poisoning, or lying in wait, or any other kind of willful, deliberate and premeditated killing (or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary) is murder of the first degree.

§ 15. **Of the Second Degree.**—The jury are further instructed, that whoever commits murder otherwise than by means of poison or lying in wait, or other kind of willful, deliberate and premeditated killing (or which is committed, etc.), is guilty of murder in the second degree.

The jury are instructed, as a matter of law, that when the unlawful killing of a human being is the result of malice suddenly produced at the time a fatal blow is struck and the killing is without premeditation or deliberation, then such killing is murder in the second degree. *McQueen vs. State*, 1 Lea (Tenn.), 285.

§ 16. **Elements of Murder in the First Degree.**—The court instructs the jury, that under our statute, to constitute murder in the first degree, the jury must be satisfied, beyond a reasonable doubt, from the evidence, not only that the defendant, without any justifiable cause or legal excuse, as explained in these instructions, killed the deceased in manner and form as charged in the indictment, but they must further believe, from the evidence, beyond any reasonable doubt, that at the time the defendant struck the fatal blow he had formed in his mind a deliberate, willful and premeditated purpose to kill the deceased, and that he struck the blow with the intention of effecting that purpose (or that he killed the deceased while attempting to perpetrate the crime, etc.) *Prinues vs. State*, 2 Tex. App., 369; *State vs. Melton*, 67 Mo., 594; *Cox vs. State*, 5 Tex. App., 493.

Although the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant, without justifiable cause or legal excuse, as explained in these instructions, killed the deceased, still, if you entertain any reasonable doubt whether the killing was willful, deliberate and premeditated, or whether the fatal blow was struck with deliberate intent on the part of the defendant that the blow should take the life of the deceased, (or in the attempt to commit, etc.), then the jury should only find the defendant guilty of murder in the second degree.

§ 17. **Killing Willfully, etc.**—That under our statute, the defendant in this case cannot be found guilty of murder in the

first degree unless the jury are satisfied, from the evidence, beyond a reasonable doubt, not only that the defendant is guilty of feloniously killing the deceased, but it must further appear, from the evidence, beyond a reasonable doubt, that such killing was done willfully, deliberately and with premeditation; that is, that it was done intentionally, sanely and with prior deliberation. And unless all these appear, from the evidence, beyond a reasonable doubt, the jury cannot lawfully find the defendant guilty of murder in the first degree. Wharton's Law of Homicide, 368.

§ 18. **No Length of Deliberation, etc., Required.**—The jury are instructed, that while the law requires, in order to constitute murder of the first degree, that the killing shall be willful, deliberate and premeditated, still, it does not require that the willful intent, premeditation or deliberation, shall exist for any length of time before the crime is committed; it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the blow is struck; and in this case, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant feloniously struck and killed the deceased, as charged in the indictment, and that before or at the time the blow was struck the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of the deceased, and that the blow was struck in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder of the first degree. 2 Whar. on Crim. Law, 948; Whar. Law of Hom., 382; 2 Bish. on Crim. Law, § 750. *Contra: Binns vs. State*, 66 Ind., 428; *Fahnestock vs. The State*, 23 Ind., 231–263; *Halbert vs. State*, 3 Tex., 656.

To constitute murder in the first degree there must have been an unlawful killing done, purposely and with premeditated malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is

not time that constitutes the distinctive difference between murder in the first and in the second degree; an unlawful killing, with malice, deliberation and premeditation constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind, and weighed and deliberated upon it. *Fahnestock vs. State*, 23 Ind., 231; *Miller vs. State*, 54 Ala., 155; *State vs. Weiners*, 66 Mo., 13; *State vs. Ahmook*, 12 Nev., 369.

§ 19. **Premeditated Design.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant shot the deceased, and thereby caused his death, in manner and form as charged in the indictment, then no matter what the provocation, and no matter what the other surrounding circumstances may have been, unless the act of shooting was justifiable, as explained in these instructions, then the defendant is guilty (of murder in the first degree); provided, you further believe, from the evidence, beyond a reasonable doubt, that the defendant did the shooting with a premeditated design to kill the deceased. *Roman vs. The State*, 41 Wis., 312.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant sought a difficulty with the deceased for the purpose of killing him, and with that design provoked a fight with him, and in the fight did kill him in pursuance of his intent of taking the life of the deceased, then the jury will find the defendant guilty of murder.

If the jury believe, from the evidence, that the defendant sought a quarrel with the deceased and first struck him a violent blow with his fist, in the expectation that the deceased would resent the blow, and in his turn attack the defendant, so that he might have a chance to shoot or stab the deceased, and thereby take his life, and further, that in accordance with such expectation the said deceased did thereupon attack the defendant with his fists, and the defendant then shot the deceased, as charged in the indictment, such killing would be murder in the first degree. *State vs. Christian*, 66 Mo., 138.

The jury are instructed, that the mere fact of an unlawful killing, if proved, raises no presumption that the killing was murder in the first degree, and unless the circumstances show, beyond a reasonable doubt, that some degree of deliberation

took place before the killing (or in the attempt, etc.), then the conviction can only be for murder in the second degree. *Newton vs. State*, 6 Neb., 136.

§ 20. **Premeditated Design—Mutual Combat.**—If the jury believe, from the evidence, that at the time of the alleged killing the defendant and the deceased met together, and mutually agreed to engage in a personal combat, and did engage in such combat, then, if the jury further believe, from the evidence, beyond a reasonable doubt, that the deceased was unarmed, and that the defendant, in anticipation of having a difficulty with deceased, had armed himself with a deadly weapon without the knowledge of the deceased, with the intention of using the same some time during the contest, and did so use it, and thereby killed the deceased, then such killing would be murder in the first degree. *State vs. Christian*, 66 Mo., 138.

If the jury believe, from the evidence, that at the time of the alleged killing, the defendant and the deceased met, and upon a sudden cause of quarrel arising between them, mutually agreed to engage in a personal combat, and did so engage in such combat, and if the jury further believe, from the evidence, beyond a reasonable doubt, that during such quarrel the defendant, without the knowledge of the deceased, made use of a deadly weapon, in such a manner as would be likely to cause the death of the deceased, and did so cause it, then the defendant was guilty of murder; and if the jury further believe, from the evidence, that the defendant so used the said deadly weapon, deliberately, and with malice aforethought, and with intent to take the life of deceased, or to do him great bodily harm, then such killing would be murder in the first degree. *State vs. Christian*, 66 Mo., 138.

§ 21. **Intoxication as Affecting Intent.**—That while it is a general rule of law that voluntary drunkenness is no excuse or justification for a crime perpetrated under its influence, still, in cases of this kind, drunkenness, if proved, may sometimes be considered by the jury for the purpose of determining whether the accused, at the time of the alleged offense, was capable of forming a willful, deliberate and premeditated

design to take life; and in this case, although the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant killed the deceased, in manner and form as charged in the indictment, still, if you further believe, from the evidence, that before and at the time the defendant struck the fatal blow he was so deeply intoxicated by spirituous liquors as to be incapable of forming, in his mind, a design, deliberately and premeditatedly, to do the act, then such killing, under such a state of intoxication, would only be murder of the second degree. *Greenlf. Evi.*, § 148; *Wharton's Law on Homicide*, 369; *Adams vs. State*, 29 Ohio St., 412. *Contra: State vs. Cross*, 27 Mo., 332.

§ 22. **By Poisoning—Material Averments to be Proved.**—The court instructs the jury, as a matter of law, that the burden of proof is on the prosecution to establish, by the evidence, every material allegation in the indictment, beyond a reasonable doubt; and if they have failed to do so, the jury must acquit the defendant.

That in order to convict the defendant of the crime charged against him, the jury must find, from the evidence:

First. That the deceased came to his death by poison.

Second. That it was administered to him by the defendant in his lifetime.

Third. That defendant administered the poison to the deceased willfully and knowingly; and with the intention of depriving him of life; and,

Fourth. That the deceased actually died from the effects of the poison so administered to him.

And if the jury entertain any reasonable doubt upon either of these material propositions, then the prosecution has failed to establish its case, and the jury must acquit the defendant.

§ 23. **Not Necessary to Prove the Particular Poison or Quantity.**—The jury are instructed, that in this class of cases, where the indictment charges that death was caused by poisoning, it is not necessary to prove the particular substance or kind of poison used, nor is it necessary to give direct and positive proof what is the quantity which would destroy life, nor is it necessary to prove that such a quantity was found in the body of

the deceased. It is sufficient, if the jury are satisfied, by the evidence, beyond a reasonable doubt, that the death was caused by poison of some kind, and that the poison was administered by the accused, with the intention of causing death. 3 Greenl. Ev., § 135; Whart. Am. Law of Hom., 323.

§ 24. **Death Hastened by, etc.**—Although the jury may believe, from the evidence, that a few days preceding the death of the deceased, he was suffering from (*any disease*), still, if the jury further believe, from the evidence, beyond a reasonable doubt, that the death of the deceased was hastened by the subsequent administration of arsenic given by the defendant, and that it was given by her for the purpose of hastening his death, then the jury should find the defendant guilty, in manner and form as charged in the indictment. 2 Greenl. Ev., § 139; 2 Bishop on Crim. Law, § 679–680; Wharton Am. Law, Hom., 241.

§ 25. **Circumstantial Evidence Must Exclude, etc.**—The jury are instructed, that when circumstances alone are relied upon by the people for a conviction, the circumstances must be such as apply exclusively to the defendant, and such as are reconcilable with no other reasonable hypothesis than that of the defendant's guilt; and they must satisfy the mind of the jury, beyond a reasonable doubt, of the guilt of the defendant.

And in this case, if the jury find, from the evidence, that all the criminating circumstances relied upon by the people for a conviction will as well apply to another person as to the defendant, or if they are reconcilable with any reasonable hypothesis other than that of the defendant's guilt, or if they do not satisfy the mind of the jury, beyond a reasonable doubt, of the guilt of the defendant, then he cannot be legally convicted, and you must acquit him.

§ 26. **Circumstances Pointing as Strongly to Some Other Person.**—Should the jury believe, from the evidence, that the deceased died from the effect of poison, administered to him by some one, still, if the jury further find, from the evidence, that some other person had the same opportunity to administer the poison that the defendant had, and that all the circumstances

point as clearly to some other person as having administered the poison, as to the defendant, then these facts are sufficient to raise a reasonable doubt, in the mind of the jury, as to the guilt of the defendant, and the jury should acquit him.

§ 27. **Pointing to Suicide.**—Although the jury should believe, from the evidence, beyond a reasonable doubt, that the deceased died from the effect of poisoning, still, if the jury further find, from the evidence, that he had the same opportunities for taking the poison himself, without the aid of the defendant, that the defendant had to give it to him, and if it is possible in any reasonable manner to explain all the facts and circumstances proved on the trial, consistently with the hypothesis that he did take the poison himself, either for the purpose of committing suicide, or as a medicine, then this is sufficient to raise a reasonable doubt in the minds of the jury as to the guilt of the defendant, and they should render a verdict of not guilty.

§ 28. **Doubt as to Which of Two or More is Guilty.**—Although the jury may believe, from the evidence, that the deceased was killed at the time and in the manner mentioned in the indictment, and that the shot that caused his death was fired by E. F., or by the defendant C. D., still, if the jury are unable, from the evidence, to determine by which of said persons the shot was fired, then the jury should consider the case precisely the same as though it had been proved that some person other than the defendant fired the fatal shot.

The jury are instructed, that if they find, from a consideration of all the evidence, that it points as clearly to one A. B. as the person who committed the crime in question, as it does to the defendant, or if, after a fair and full consideration of all the evidence, the jury entertain a reasonable doubt as to whether the said A. B. or the defendant is the guilty party, then the jury should acquit the defendant.

§ 29. **Murder Not Reduced to Manslaughter by Provoking Words.**—The court further instructs the jury, that where a person strikes another with a deadly weapon, in a manner calculated or likely to produce death, no words of reproach, or

abuse, or gestures, however irritating or provoking, amount to considerable provocation in law, so as to reduce the crime of killing from murder to manslaughter, in case such blow results in death. *People vs. Turley*, 50 Cal., 469; *Bird vs. State*, 50 Ga., 585.

In the case of a voluntary killing of a human being, without lawful excuse or justification, in order to reduce the offense from murder to manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt, by the person killed, to commit a serious personal injury on the person killing.

§ 30. Verdict May be for Lesser Crime.—The indictment in this case charges the highest degree of felonious homicide known to the law, that is, murder in the first degree, and under this indictment, if the evidence requires it, as explained in these instructions, the jury may find the defendant guilty of either murder in the first or second degree, or of voluntary or involuntary manslaughter, or the jury may find the defendant not guilty. *Archey vs. State*, 60 Ind., 56.

If the evidence, under the instruction of the court as to the law of the case, require it, you may find the defendant guilty of murder in the first or in the second degree, or you may find him guilty of manslaughter, or you may find him not guilty. If all the allegations in the (first count of the) indictment have been proved to your satisfaction, beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree. If all the allegations of the indictment have been proved beyond a reasonable doubt, except the allegation of deliberate or premeditated killing, you should find the defendant guilty of murder in the second degree; and if you find, from the evidence, beyond a reasonable doubt, that the defendant did unlawfully kill the deceased, upon a sudden quarrel, and without malice, or unintentionally, while the defendant was attempting to commit any unlawful act not amounting to felony, then the offense would be manslaughter; or if the jury have any reasonable doubt, arising upon all the evidence in the case, as to the defendant being guilty of one of these crimes, they should simply find the defendant not guilty. *Binns vs. State*, 66 Ind., 428; *Adams vs. State*, 29 Ohio St., 462.

§ 31. **Verdict may be for Manslaughter.**—The jury are instructed, that under an indictment for murder, a party accused may be found guilty of manslaughter. And in this case, if after a careful and dispassionate consideration of all the proof and circumstances in evidence before you, you have any reasonable doubt as to whether the defendant is guilty of murder, then you should consider whether he is guilty of manslaughter; and if from a full and careful consideration of all the evidence before you, you believe, beyond a reasonable doubt, that the defendant is guilty of manslaughter, you should so find by your verdict (and in that event it will be your duty to fix, by your verdict, the term for which he shall be confined in the penitentiary, which may be for any length of time, not less than one year, and it may be for the term of his natural life). *Schnier vs. The People*, 23 Ill., 1.

MANSLAUGHTER.

§ 32. **Manslaughter Defined.**—Manslaughter is the unlawful and felonious killing of another without any malice, either expressed or implied (and without any mixture of deliberation whatever). It may be voluntary or involuntary.

§ 33. **Voluntary.**—In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of the sudden, violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder. *Bruner vs. State*, 58 Ind., 159; *Nye vs. The People*, 35 Mich., 16.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant unlawfully and feloniously struck the deceased a blow which caused his death, then to reduce the killing from murder to manslaughter, the jury must believe, from the evidence, that the provocation for the blow

arose at the time the blow was given, and that the passion was not the result of a former provocation; that such passion was either anger, rage, sudden resentment or terror, which rendered the defendant incapable of cool reflection upon the character and results of his acts, and that the act was directly caused by passion arising out of such provocation. *Bayett vs. State*, 2 Tex. App., 93; *Seals vs. State*, 59 Tenn., 459.

§ 34. **Involuntary.**—Involuntary manslaughter consists in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence, in an unlawful manner.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant killed the deceased without any legal excuse or justification, as explained in these instructions, still, if the jury further believe, from the evidence, that the *instrument used* was not a deadly weapon, and that when the defendant struck the blow it was not his intention to take the life of the deceased, but only to chastise him, then you should find the defendant guilty of manslaughter. 2 Whar., § 944-931.

The jury are instructed, that if from motives of hatred, revenge, jealousy, or for any wrong or injury, real or imaginary, a sane person kills another, the killing will be referred to malice, and must be regarded as murder. If, however, the killing is the result of a sudden, violent impulse of passion, caused by a serious or highly provoking injury inflicted upon the person killing, and which is sufficient, in the minds of the jury, to excite an irresistible passion in a reasonable person, and the interval of time between the provocation and the killing is not sufficient for the passions to cool and the voice of reason and humanity to be heard, then the killing is manslaughter, and not murder. *Schnier vs. The People*, 23 Ill., 1; *Fisher vs. The People*, 23 Ill., 283.

The jury are instructed, that if they believe, from the evidence, that defendant voluntarily got into a difficulty, or fight, with the deceased, but did not intend to kill him, at the time, and did not decline further fighting before the fatal blow was struck, and then drew his knife, and with it struck

and killed the deceased, then the jury should find the defendant guilty of manslaughter; although the jury may further believe, from the evidence, that the cutting and killing were done in order to prevent the deceased from getting the advantage in the fight, or doing the defendant great bodily injury.

MALICE AND INTENT.

§ 35. **Malice Defined.**—The court instructs the jury, that malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. *State vs. Goodenow*, 65 Me., 30; *State vs. Weeners*, 66 Mo., 13.

§ 36. **Malice Denotes any Wicked or Corrupt Motive.**—That malice is not confined to ill-will towards an individual, but it is intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty, and fully bent on mischief, indicates malice within the meaning of the law; hence, malice is implied from any deliberate and cool act against another, however sudden, which shows an abandoned and malignant heart. *Archey vs. State*, 64 Ind., 56.

§ 37. **Malice Presumed, When.**—The court instructs the jury, that if, without such provocation as is apparently sufficient to excite irresistible passion, a person strikes another with a deadly weapon, likely to occasion death, although he had no previous malice or ill-will against the party struck, yet he is presumed to have had such malice at the moment of striking, and if death results from the blow it will be murder.

§ 38. **Malice Aforethought.**—The jury are instructed, that the deliberate intention, called malice aforethought, need be only such deliberation and thought as enables a person to appreciate and understand, at the time the act was committed, the nature of his act and its probable results.

To constitute malice aforethought, no particular time need

intervene between the formation of the intention and the act; it is enough if the intent to commit the act, with a full appreciation of the result likely to follow, was present at the time the act was committed, and that the act was not the result of some sudden heat of passion, provoked by some cause calculated to override the judgment, and before sufficient time elapsed for reason to resume its sway. *Nye vs. People*, 35 Mich., 16.

§ 39. **Malice Implied.**—The jury are instructed, that malice is always implied in law from a willful and criminal act, unless the evidence shows that the defendant was acting from some innocent or proper motive.

§ 40. **Intent, How Proved.**—Upon the question of intent, the court instructs the jury, that the law presumes a man to intend the reasonable and natural consequences of any act intentionally done; and this presumption of law will always prevail, unless, from a consideration of all the evidence bearing upon the point, the jury entertain a reasonable doubt whether such intention did exist.

§ 41. **Presumed to Intend the Natural Consequences of the Act.**—That the law presumes that a person intends all the natural, probable and usual consequences of his act; that when one person assaults another violently with a dangerous weapon, likely to kill, not in self-defense, or in defense of habitation, property or person, and not in a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible or involuntary, and the life of the party thus assaulted is actually destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily harm was intended, and in such case the law implies malice, and such killing would be murder.

The accused is presumed to have been of sound mind, at the time of the alleged killing, unless the evidence leaves a reasonable doubt, in the minds of the jury, upon that point. The law presumes, that every sane person contemplates and intends the natural, ordinary and usual consequences of his own voluntary acts, unless the contrary appears, from the evidence; and

if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by any act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that the death of the deceased was designed by the slayer, unless the facts and circumstances of the killing or the evidence creates a reasonable doubt whether the killing was done purposely. *Archey vs. State*, 64 Ind., 56.

INSANITY AS A DEFENSE.

§ 42. **Criminal Responsibility.**—The jury are instructed, as a matter of law, that if a person has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act in question—that is, if he has knowledge and is conscious that the act he is doing is wrong and would deserve punishment—he is, in the eye of the law, of sound mind and memory, and capable of committing crime. *Brinkley vs. The State*, 58 Ga., 296.

If you believe, from the evidence, beyond a reasonable doubt, that at the time of committing the alleged act the defendant was able to distinguish right from wrong, then you cannot acquit him on the ground of insanity.

If you believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime in manner and form as charged in the indictment, and at the time of committing such act was able to distinguish right from wrong, you should find him guilty.

If, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor. *Dunn vs. People*, 109 Ill., 635.

In this case it is claimed for the defendant, that at the time of the commission of the act his mind and judgment were affected by an insane delusion, that, etc., and to such an extent as to render him of unsound mind, and not responsible for his acts.

In reference to this point the court instructs the jury, that although they may believe, from the evidence, that the defendant, at the time he fired the pistol, did believe and suppose, that, etc., this would not exempt him from liability for his acts, if the jury believe, from the evidence, beyond a reasonable doubt, that he intentionally fired the shot which killed the deceased, and that he knew and was conscious at the time, that the act he was doing was wrong and punishable by the laws of the land. *State vs. Mewhester*, 46 Iowa, 88.

§ 43. **When not Responsible.**—If the jury believe, from the evidence, that at the time when the fatal blow is alleged to have been struck, the defendant was so far affected in his mind and memory that he was not able to distinguish right and wrong, and had not knowledge and understanding of the character and consequences of his act and power of will to abstain from it, then he was not a legally responsible being, and the jury should find him not guilty. *State vs. Mewherter*, 46 Iowa, 88; 1 Whar. Crim. Law, 7 Ed.; *Com. vs. Rogers*, 7 Metc., 500; *Freeman vs. People*, 4 Denio, 10; *Stute vs. Hunting*, 21 Mo., 464; *Willis vs. People*, 5 Tiffany, 715; *Anderson vs. State*, 45 Ga., 11; *People vs. Coffman*, 24 Cal., 230.

NOTE.—Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity. The first is, that insanity, as a defense of confession and avoidance, must be proved by the defendant beyond a reasonable doubt, and, unless this be done, the case of the prosecution being otherwise proved, the jury are to convict. The second is, that the jury are to be governed by the preponderance of the evidence, and are not to require insanity to be made out beyond a reasonable doubt. A third view is, that on such an issue the prosecution must prove sanity beyond a reasonable doubt. Under one or the other of the last two rules the following instructions will be proper.

§ 44. **Burden of Proof.**—The court instructs the jury, that in all criminal cases, before conviction can be had, the jury must be satisfied, from the evidence, beyond a reasonable

doubt, that the defendant is guilty, in manner and form as charged in the indictment.

§ 45. **Reasonable Doubt as to Sanity.**—In order to sustain the defense of insanity it is not necessary that the insanity of the accused be established, by a preponderance of evidence; if, upon the whole evidence, the jury entertain a reasonable doubt as to the sanity of the accused they must acquit him. *Hopps vs. People*, 31 Ill., 385; *People vs. Wilson*, 49 Cal., 13; *State vs. Bruce*, 48 Ia., 530; See *State vs. Wingo*, 66 Mo., 181.

While it is true the law presumes every man to be sane and responsible for his acts until the contrary appears, from the evidence, still, if there is evidence in the case tending to rebut this presumption sufficient to raise a reasonable doubt upon the issue of insanity, then the burden of proof is upon the people to show, by the evidence, beyond a reasonable doubt, that the defendant was sane, as explained in these instructions, at the time the alleged offense was committed. *Cone vs. McKie*, 1 Gray, 61; Greenl. Ev., 13 Ed., § 81.

§ 46. **Sanity Presumed—Insanity Must be Proved.**—The court instructs the jury, that the law presumes every one to be sane and responsible for his acts until the contrary be shown by the evidence, and when insanity is set up as a defense to an alleged criminal act, the burden of proof is upon the defendant to show, by a preponderance of evidence, that he was affected by insanity, or by some insane delusion, as explained in these instructions, at the time of the act, to such an extent that he did not know what he was doing, or that he did not know that what he was doing was wrong. 1 Whar. Crim. Law, 7 Ed., 55; *State vs. Lawrence*, 57 Me., 574; *Com. vs. Eddy*, 7 Gray, 583; *Ferris vs. The People*, 35 N. Y., 125; *Loeffner vs. State*, 10 Ohio St., 599; *State vs. Hundley*, 46 Mo., 414; *State vs. Felter*, 32 Iowa, 50; *Dacey vs. The People*, 116 Ill., 555.

§ 47. **Impulse of Passion no Defense.**—The jury are instructed that one who, in possession of a sound mind, commits a criminal act under the impulse of passion, or revenge, which may temporarily dethrone his reason, or for the time being control

his will, cannot be shielded from the consequences of the act by the plea of insanity.

§ 48. **Act Must be in Consequence, etc.**—That insanity will only excuse the commission of a criminal act when it is made to appear, affirmatively, by a preponderance of the evidence, that the person committing it was insane, and that the offense was the direct consequence of his insanity. *State vs. Stickley*, 41 Iowa, 232.

§ 49. **Partial Insanity.**—That the law recognizes partial as well as general insanity; that a person may be insane upon one or more subjects, and sane as to others; that he may be laboring under a mental delusion upon some particular matter, or regarding a particular person, and generally sane upon all other subjects. As regards the guilt or innocence of a party charged with the commission of crime it makes no difference whether the act charged was produced by general insanity or by mental delusion regarding some particular subject or person. If the person charged is, at the time of the alleged offense, laboring under a mental delusion, and the act itself is the product of such delusion, and the party, at the time, did not know or realize that he was doing wrong, or committing a crime, then he cannot be held criminally responsible for the act.

§ 50. **Insanity the Efficient Cause, etc.**—The court instructs the jury, that when a person is on trial on an indictment for murder, and the defense of insanity is set up, and it appears, from the evidence, that at the time of doing the act charged the prisoner was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act, and that he would not have done it, but for the affection, then he ought to be acquitted.

§ 51. **Insanity—Test of Insanity.**—The court instructs the jury, that the law presumes every man to be sane until the contrary is shown, and when insanity is set up as a defense by a person accused of crime, in order that the defense may avail, the jury ought to believe, from the evidence, that, at the time of the commission of the crime, the mind of the

accused was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect to the killing; or if he was conscious of the act he was doing, and knew its consequences, that he was, in consequence of his insanity, wrought up to a frenzy which rendered him unable to control his actions or direct his movements.

To constitute a defense, the unsoundness of mind, or insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged by overruling the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them.

§ 52. **Drunkenness no Excuse for Crime.**—The jury are instructed, that voluntary intoxication or drunkenness is no excuse for crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act. *State vs. Coleman*, 27 La. Ann., 691; *Beasley vs. State*, 50 Ala., 149; *State vs. Thompson*, 12 Nev., 140; *Fitzpatrick vs. People*, 98 Ill., 270; *Cobbath vs. State*, 2 Tex. App., 391.

In relation to the question of drunkenness as an excuse for crime, the court instructs the jury, that if a person is sober enough to intend to shoot at another, and actually does shoot at and hit him, without any justification therefor, then the law presumes that such person is sober enough to form the specific intention to kill the one shot at, and, in such case, he is criminally responsible for his act. *Estes vs. State*, 55 Ga., 31; 1 Wharton Crim. Law, § 32.

The jury are further instructed, as a matter of law, that if a person voluntarily becomes intoxicated, even total insanity, if the immediate result of such intoxication, does not excuse a criminal act committed while under the influence of such intoxication. 1 Wharton on Crim. Law, § 32.

The jury are further instructed, that while intoxication or drunkenness is no excuse for a criminal act committed under its influence, still settled insanity produced by intoxication excuses an act committed under its influence and caused by it, in the same way as insanity produced by any other cause. 1 Wharton Crim. Law, § 33.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant committed the act charged, in manner and form as charged in the indictment, still, if the jury further believe, from the evidence, that the defendant, at the time, was in such a state of mental insanity (not produced by the immediate effects of intoxicating drink) as not to have been conscious of what he was doing, or that the act itself was wrong, then they should find the defendant not guilty. *U. S. vs. Drew*, 5 Mason U. S. Reports, 28; *Carter vs. State*, 12 Tex., 500; *Maconnehey vs. State*, 5 Ohio St., 77; *Bales vs. State*, 3 W. Va., 685; *Fisher vs. State*, 64 Ind., 435.

The jury are instructed, that under our law voluntary drunkenness is no excuse for the commission of a crime. Where, without intoxication, the law would impute a criminal intent, proof of drunkenness will not avail to disprove such intent. *Rafferty vs. The People*, 66 Ill., 118.

The jury are instructed, that although they may believe, from the evidence, that the defendant committed the criminal act, in manner and form as charged in the indictment, still, if the jury further believe, from the evidence, that at the time he so committed the act he was so affected by what is known as delirium tremens that he did not know the nature of the act, nor whether it was wrong or not, and that such delirium was induced by antecedent and long-continued use of intoxicating drinks, and not as the immediate effect of intoxication, then the defendant cannot be held criminally responsible for such act, and the jury should find the defendant not guilty. *Bailey vs. State*, 26 Ind., 422.

Although drunkenness, in itself, is no excuse or palliation for crime committed while under its influence, yet mental unsoundness, superinduced by excessive drunkenness, and continuing after the intoxication has subsided, may be an excuse; provided such mental derangement be sufficient to deprive the accused of the ability to distinguish between right and wrong. *Beasley vs. The State*, 50 Ala., 149.

Although it is the law in this state that a criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, yet where, without intoxication, the law will impute to the act a criminal intent, as in the

case of wanton killing without provocation, voluntary drunkenness is not available to disprove such intent. *Upstone vs. People*, 109 Ill., 177.

If you believe, from the evidence, beyond a reasonable doubt, that the defendant, when voluntarily intoxicated, committed the homicide charged in the indictment, under such circumstances as would have constituted such an act by one not intoxicated, murder, then you are instructed that such intoxication would not reduce the crime of the defendant from murder to manslaughter, nor would such intoxication be any excuse or defense to the act. *Ibid.*

The court further instructs you, that if you believe, from the evidence, beyond a reasonable doubt, each of the following propositions, to wit: that at about two hours before the commission of the alleged homicide defendant was sane, and had the power to abstain from drinking alcohol; that defendant then knew that the drinking of alcohol by him would have the effect to render him insane or crazy; that defendant, so knowing the effect of alcohol upon him, and being sane, and having the power to abstain from taking alcohol, did then and there voluntarily drink alcohol; that the alcohol so drank by the defendant then and there made him insane or crazy; that while insane or crazy from the effects of such alcohol defendant committed the act charged in the indictment, at the time and place, and in the manner and form, therein charged—then you should find defendant guilty. *Upstone vs. The People*, 109 Ill., 177.

Insanity resulting from habitual intoxication, though voluntary, if it has been long continued and has produced disease, which has so far perverted or destroyed the mental faculties as to render the person so affected incapable, by reason of such disease, of acting from motives or of distinguishing between right and wrong when sober, is a defense to a prosecution for a crime committed while in that condition. *Fisher vs. State*, 64 Ind., 435; *Gillooley vs. State*, 58 Ind., 182.

The court instructs the jury, that voluntary intoxication furnishes no excuse for a crime committed under its influence, even if the intoxication is so extreme as to make the author of the crime unconscious of what he is doing, or to create a temporary insanity.

SELF-DEFENSE.

§ 53. **Justifiable Homicide—Self-Defense.**—The jury are instructed, that justifiable homicide is the killing of a human being in self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either.

A bare fear of any of these offenses is not sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing acted under the influence of those fears. *Thompson vs. State*, 55 Ga., 47; *Wall vs. State*, 51 Ind., 453; *State vs. Stockton*, 61 Mo., 382.

The jury are instructed, as a matter of law, that if a person believes, and has reasonable cause to believe, that another has sought him out for the purpose of killing him, or of doing him great bodily harm, and that he is prepared therefor with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has the right to stand and defend himself, and pursue his adversary until he has secured himself from danger; and if, in so doing, it is necessary, or upon reasonable grounds it appears to be necessary, to kill his antagonist, the killing is excusable upon the grounds of self-defense. *State vs. Alley*, 68 Mo., 124; *Fortenberry vs. State*, 55 Miss., 403; *Erwin vs. State*, 29 Ohio St., 186.

If the jury believe, from the evidence, that the defendant procured the stick with which the blow in question was struck, only for the purpose of self-defense, and did not intend to use it for any other purpose, and that the deceased was armed with a deadly weapon, and was turning to attack the defendant, and that the defendant was aware of these facts and knew or had good ground to believe and did believe when he struck, etc., that that was the only mode by which he could avoid great bodily harm to himself, and that he used no more force than was reasonably necessary for his own defense, then his act was not unlawful, and the jury should find the defendant not guilty. *Marts vs. State*, 26 Ohio St., 162.

§ 54. **Danger Need not be Real, if Reasonably Apparent.**—The court instructs the jury, that the law is: If a person is as-

saulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible, criminally, if he acts in self-defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. *Steinmeyer vs. The People*, 95 Ill., 383; *Roach vs. The People*, 77 Ill., 25; *State vs. Fraunburg*, 40 Ia., 555; *State vs. Bohan*, 19 Kas., 28; *Crews vs. The People*, 120 Ill., 317.

A person need not be in actual imminent peril of his life, or of great bodily harm, before he may slay his assailant; it is sufficient if, in good faith, he has a reasonable belief, from the facts as they appear to him at the time, that he is in such imminent peril. *Murray vs. Com.*, 79 Pa. St., 311; *Roach vs. The People*, 71 Ill., 25.

That the rule of law on the subject of self-defense is this: Where a man in the lawful pursuit of his business is attacked, and when, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the killing of the assailant, under such circumstances, will be excusable or justifiable homicide, although it should afterwards appear that no injury was intended and no real danger existed.

If the jury believe, from the evidence, that the defendant was assaulted by the deceased in such a way as to induce in the defendant a reasonable and well-grounded belief that he was actually in danger of losing his life or of suffering great bodily harm, then he was justified in defending himself, whether the danger was real or only apparent. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances and determine therefrom as to the actual state of things surrounding them; and, in such cases, if persons act from honest convictions, induced by reasonable evidence, they will not be held responsible, criminally, for a mistake as to the extent of the actual danger. *Parker vs. State*, 55 Miss., 414; *Bode vs. State*, 6 Tex. App.,

424; *Kennedy vs. Com.*, 14 Bush. (Ky.), 340; *West vs. State*, 59 Ind., 113.

If the jury believe, from the evidence, that at the time the said defendant is alleged to have shot the deceased, the circumstances surrounding the defendant were such as in sound reason would justify, or induce in his mind, an honest belief that he was in danger of receiving, from the deceased, some great bodily harm, and that the defendant, in doing what he then did, was acting from the instinct of self-preservation, then he is not guilty, although there may, in fact, have been no real or actual danger.

In considering whether the killing was justifiable on the ground that the killing was in self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the prisoner in making what is claimed to be this self-defense, as bearing upon the question whether the blows, if given, were actually given in self-defense, or whether they were given in carrying out an unlawful purpose; and if the jury believe, from the evidence, that the force used was unreasonable, in amount and character, and such as a reasonable mind would have so considered, under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defense. *Close vs. Cooper*, 34 Ohio St., 98.

§ 55. **Force may be Resisted by Force.**—The jury are instructed, that under the laws of this state a person has a right to resist an unlawful attack by force; and if it be necessary to preserve the life of the person assailed, or to prevent great bodily injury to him, the repelling force may go to the extent of taking the life of the assailant.

§ 56. **Assailant Retiring from the Fight.**—The jury are instructed, that although they may believe, from the evidence, that the defendant commenced the fight in question, and made the first attack upon the deceased, still, if the jury further believe, from the evidence, that the defendant afterwards, and before the fatal blow was struck, ceased to fight, and in good faith withdrew from the conflict by retreating, or otherwise,

then the right of deceased to employ force against the defendant ceased; and if the deceased did not then desist from attempting to use violence towards the defendant, then the defendant's right to defend himself revived; and if he then found himself in apparent danger of losing his life, or of sustaining great bodily injury at the hands of the deceased, he had the same right to defend himself that he would have had if he had not originally commenced the conflict. *Terrell vs. The Commonwealth*, 13 Bush. (Ky.), 246.

To justify the taking of life, in self-defense, it must appear, from the evidence, that the defendant not only really, and in good faith, endeavored to decline any further struggle, and to escape from his assailant before the fatal blow was given, but it must also appear that the circumstances were such as to excite the fears of a reasonable person that the deceased intended to take his life, or to inflict on him great bodily harm, and that the defendant really acted under the influence of these fears and not in a spirit of revenge. *Parish vs. The State*, 14 Neb., 60; *State vs. Sorenson*, 32 Minn., 118.

§ 57. **Defense of Habitation.**—The law is that one assailed with a deadly weapon in his own house, is not obliged to flee. If such a person is violently assaulted, without being in fault, he may repel force by force, and if, in the reasonable exercise of his right of self-defense, and using no more force than is apparently necessary in defense of himself and habitation, he kills his assailant, the killing is justifiable homicide. *Runyan vs. State*, 57 Ind., 80; *State vs. Harman*, 78 N. C., 515; *State vs. Middleham*, 62 Ia., 150.

If the jury believe, from the evidence, that the defendant, in defense of himself, inflicted upon the deceased the wounds or stabs which caused his death, while deceased was manifestly intending and endeavoring, in a violent manner, to enter the habitation of defendant, for the purpose of assaulting or offering personal violence to him, or to any member of his family being therein, then the killing would be justifiable, and the jury should find the defendant not guilty.

If the jury believe, from the evidence, that just prior to his death the deceased attempted, in a violent manner, to enter the dwelling of the defendant, for the purpose of assaulting

him, or offering personal violence to the defendant, being in said dwelling, or any other person being or dwelling therein, and that the defendant, in reasonably resisting such attempt of the deceased, unintentionally and without malice, killed him, then the killing was justifiable or excusable, and the jury ought to acquit the defendant.

The jury, in considering whether the killing was in defense of habitation, should consider all the circumstances attending the killing, and the conduct of the parties at the time, and immediately previous thereto, and the means and force used as bearing upon the question of whether the killing was in defense of habitation, in good faith, or whether it was done maliciously and in a spirit of hatred or revenge. *Greschia vs. The People*, 53 Ill., 295.

§ 58. **Attack Provoked by the Defendant.**—The court instructs the jury, that a party charged with an unlawful or deadly assault upon another, cannot avail himself of the claim of necessary self-defense if the necessity for such defense was brought on by his own deliberate, wrongful act. *Adams vs. The People*, 47 Ill., 376.

§ 59. **Danger Must Be Reasonably Apparent.**—The court instructs the jury, that although they should find, from the evidence, that the said A. B. and the defendants got into a quarrel at the time in question, and that the said A. B. followed the defendant up in a threatening manner, still, the defendant would have no right to assault the said A. B. with a deadly weapon in a manner calculated to take life, or do great bodily injury, unless the circumstances were such as to lead a reasonable person to believe that such an assault was necessary, on the part of the said defendant, in self-defense, to prevent receiving a great bodily injury himself. *Judge vs. State*, 58 Ala., 406; *Jackson vs. State*, 6 Bax. (Tenn.), 452; *Davis vs. People*, 88 Ill., 350.

The court instructs the jury, that if a man kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life, or of great bodily harm, in the mind of an ordinarily courageous man,

the law will not justify the killing on the ground of self-defense.

If the jury believe, from the evidence, that defendant had no reason to believe that deceased intended to take his life, or to inflict on him any great bodily harm, or to do anything more than to have a fair fight, and that defendant struck the fatal blow in revenge, or in a reckless spirit, the defendant is not entitled to claim exemption from punishment on the ground that the killing was in self-defense.

That no one has a right to kill another, even in self-defense, unless such killing is apparently necessary for such defense. Before a person can justify taking the life of a human being, on the ground of self-defense, he must, when attacked, employ all reasonable means within his power consistent with his safety to avoid the danger and avert the necessity for the killing.

CHAPTER LVI.

INSTRUCTIONS IN THE ANARCHISTS' CASE.

The instructions given by the court in the trial of the Anarchists at Chicago, and approved by the Supreme Court of Illinois. *August Spies et al. vs. The People*, 122 Ill. Sup. Court Repts., 79; 12 Northeastern Reporter, 865; 10 Western Reporter, 701.

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3. Liberty of speech limited—Accessory defined.
4. Conspiracy to overthrow the law.
5. An act done in pursuance of a common design may be shown by circumstantial evidence.
6. Conspiracy to excite people to sedition, etc.
7. Conspiracy may be shown by circumstantial evidence.
8. Offense is committed where parties further the original plan.
9. Circumstantial evidence competent.
10. Meaning of circumstantial evidence.
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14. Jury the judges of the law.
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17. The form of the verdict.

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4. Reasonable doubt raised by evidence or ingenuity of counsel.
5. Verdict of not guilty means that the guilt has not been proven.
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7. The burden of proof is on the prosecution.
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24. Omission to testify creates no presumption against defendants.
25. The jury should endeavor to reconcile the testimony of defendants' witnesses.
26. The jury have no right to disregard the testimony of the defendants.
27. Rule as to verbal admissions of defendants.
28. Improper for the jury to regard statements of the prosecuting attorney.
29. The rule where conviction is sought upon circumstantial evidence.
30. Proof that the defendants contemplated the commission of the crime not enough to warrant their conviction.
31. Rule where the proof shows conduct of no less turpitude than the crime charged.
32. Allusions of the prosecuting attorney to dangerous views entertained by the defendants.
33. The right to arm for defense and protection.
34. Right to repel an illegal attack by force.
35. Burden not on the defendants to show who threw the bomb.
36. There must be a direct connection between the advice and the consummation of the crime.
37. The person who threw the bomb must have been acting under the teaching of the defendants, etc.
38. Not liable for the throwing of the bomb unless it was in furtherance of the common design.

INSTRUCTIONS GIVEN BY THE COURT ON ITS OWN MOTION.

1. Instructions to be in writing—Practice.
2. Jury to scrutinize the instructions.
3. General rule of law applying to the case.

INSTRUCTION ON MANSLAUGHTER GIVEN FOR DEFENDANTS.

1. Manslaughter defined—Jury may find defendants guilty of manslaughter.

INSTRUCTIONS FOR THE PEOPLE.

1. **Definition of Murder.**—The court instructs the jury, in the language of the statute, that murder is the unlawful killing of a human being, in the peace of the people, with malice afore-

thought, either expressed or implied. An unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature, which is manifested by external circumstances, capable of proof. Malice shall be implied when no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart.

2. **Penalty.**—The court instructs the jury, that whoever is guilty of murder shall suffer the penalty of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused, or any of them, are found guilty by the jury, the jury shall fix the punishment by their verdict.

3. **Liberty of Speech Limited—Accessory Defined.**—The court instructs the jury that, while it is provided by the Constitution of the State of Illinois that “every person may freely speak, write and publish on all subjects,” he is, by the Constitution, held responsible under the laws for the abuse of the liberty so given. Freedom of speech is limited by the laws of the land to the extent, among other limitations, that no man is allowed to advise the committing of any crime against the person or property of another. And so the statute provided: “An accessory is he who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal and punished accordingly.”

4. **Conspiracy to Overthrow the Law.**—The court further instructs the jury, as a matter of law, that if they believe from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or to unlawfully resist the officers of the law, and if they further believe, from the evidence, beyond a reasonable doubt, that in pursuance of

such conspiracy, and in furtherance of the common object, a bomb was thrown by a member of such conspiracy at the time, and that Matthias J. Degan was killed, then, such of the defendants, as the jury believe, from the evidence, beyond a reasonable doubt, to have been parties to such conspiracy, are guilty of murder, whether present at the killing or not, and whether the identity of the person throwing the bomb be established or not.

5. An Act Done in Pursuance of a Common Design May be Shown by Circumstantial Evidence.—The court instructs the jury that a conspiracy may be established by circumstantial evidence, the same as any other fact, and that such evidence is legal and competent for that purpose. So, as to whether an act committed was done by a member of a conspiracy may be established by circumstantial evidence, whether the identity of the individual who committed the act be established or not, and, also, whether an act done was in pursuance of the common design, may be ascertained by the same class of evidence; and if the jury believe, from the evidence in the case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force, or destroy the legal authorities of this city, county or state, by force, and that in furtherance of this common design, and by a member of such conspiracy, Matthias J. Degan was killed, then these defendants, if any, whom the jury believe, from the evidence, beyond a reasonable doubt, were parties to such conspiracy, are guilty of the murder of Matthias J. Degan, whether the identity of the individual doing the killing be established or not, or whether such defendants were present at the time of the killing or not.

6. Conspiracy to Excite People to Sedition, etc.—If these defendants, or any two or more of them, conspired together, with or not with any other person or persons, to excite the people, or classes of the people of this city to sedition, tumult and riot, to use deadly weapons against and take the lives of other persons, as a means to carry their designs and purposes into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring publicly,

by print or speech, advised or encouraged the commission of murder without designating time, place or occasion at which it should be done, and in pursuance of and induced by such advice or encouragement murder was committed, then all of such conspirators are guilty of such murder, whether the persons who perpetrated such murder can be identified or not. If such murder was committed in pursuance of such advice or encouragement, and was induced thereby, it does not matter what change, if any, in the order or condition of society, or what, if any, advantage to themselves or others, the conspirators proposed as a result of their conspiracy. Nor does it matter whether such advice or encouragement had been frequent and long continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice and encouragement, or was or was not induced thereby to commit the murder. If there was such conspiracy, as in this instruction is recited, and such advice or encouragement was given, and murder committed in pursuance of or induced thereby, then all of such conspirators are guilty of murder. Nor does it matter, if there was such a conspiracy, how impracticable or impossible of success the ends and aims were, nor how foolish or ill-arranged were the plans for its execution, except as bearing on the question whether there was or was not such conspiracy.

7. Conspiracy may be Shown by Circumstantial Evidence.—The court instructs the jury, that a conspiracy may be established by circumstantial evidence the same as any other fact, and that such evidence is legal and competent for that purpose. So, as to whether an act committed was done by a member of a conspiracy, may be established by circumstantial evidence, whether the identity of the individual who committed the act be established or not, and also whether an act done was in pursuance of the common design may be ascertained by the same class of evidence; and if the jury believe, from the evidence in this case, beyond a reasonable doubt, that the defendants, or any of them, conspired and agreed together, or with others, to overthrow the law by force or destroy the legal authorities of this city, county or state by force, and that in furtherance of the common design, and by a member of such

conspiracy, Matthias J. Degan was killed, then these defendants, if any, whom the jury believe, from the evidence, beyond a reasonable doubt, were parties to such conspiracy, are guilty of the murder of Matthias J. Degan, whether the identity of the individual doing the killing be established or not, or whether such defendants were present at the time of the killing or not.

8. **Offense Committed where Parties Further the Original Plan.**—The jury are instructed, as a matter of law, that all who take part in the conspiracy after it is formed, and while it is in execution, and all who, with knowledge of the facts, concur in the plan originally formed, and aid in executing them, are fellow conspirators. Their concurrence, without proof of any agreement to concur, is conclusive against them. They commit the offense when they become parties to the transaction or further the original plan with knowledge of the conspiracy.

9. **Circumstantial Evidence Competent.**—The court instructs the jury, as a matter of law, that circumstantial evidence is just as legal and just as effective as any other evidence, provided the circumstances are of such a character and force as to satisfy the minds of the jury of the defendants' guilt beyond a reasonable doubt.

10. **Meaning of Circumstantial Evidence.**—The court instructs the jury, that what is meant by circumstantial evidence in criminal cases, is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the party charged, and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendants, beyond a reasonable doubt, then such evidence is sufficient to authorize the jury to find the defendants guilty.

The law exacts the conviction wherever there is legal evidence to show the defendants' guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence.

§ 11. **Defendants as Witnesses—Rule as to Credibility.**—The court instructs the jury, as a matter of law, that when the de-

fendants, August Spies, Michael Schwab, Albert R. Parsons and Samuel Fielden, testified as witnesses in this case, each became as any other witness, and the credibility of each is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to the testimony of any one of said above named defendants, the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand and during the trial, and the jury are also to take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses. And the court further instructs the jury, that if, after considering all the evidence in this case, they find that any one of said defendants, August Spies, Michael Schwab, Albert R. Parsons and Samuel Fielden, has willfully and corruptly testified falsely to any fact material to the issue in this case, they have the right to entirely disregard his testimony, excepting so far as his testimony is corroborated by other credible evidence.

12. **The Rule as to the Presumption of Innocence.**—The rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent persons being unjustly punished.

13. **The Reasonable Doubt.**—The court instructs the jury, as a matter of law, that, in considering the case, the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty; if, after considering all the evidence, you can say you have an

abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

14. Jury Judges of the Law.—The court instructs the jury, that they are the judges of the law as well as the facts in this case, and if they can say upon their oaths, that they know the law better than the court itself, they have the right to do so. But before assuming so solemn a responsibility they should be assured that they are not acting from caprice or prejudice; that they are not controlled by their will or their wishes; but from a deep and confident conviction that the court is wrong, and that they are right. Before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them that right.

15. Not at Liberty to Disbelieve as Jurors, if they Believe as Men.—The court further instructs the jury, as a matter of law, that the doubt which the juror is allowed to retain on his own mind, and under the influence of which he should frame a verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible state of facts, differing from that established by the evidence; you are not at liberty to disbelieve as jurors, if you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered.

16. The Jury May find all Guilty or all not Guilty.—In this case the jury may, as in their judgment the evidence warrants, find any or all of the defendants guilty or not, or all of them not guilty; and if in their judgment the evidence warrants, they may, in case they find the defendants or any of them guilty, fix the same penalty for all of the defendants found guilty, or different penalties for the different defendants found

guilty. In case they find the defendants, or any of them, guilty of murder, they should fix the penalty either at death or at imprisonment in the penitentiary for life, or at imprisonment in the penitentiary for a term of any number of years not less than fourteen.

17. The Form of the Verdict.—If all the defendants are found guilty, the form of your verdict will be:

We, the jury, find the defendants guilty of murder, in manner and form as charged in the indictment, and fix the penalty ———.

If all are found not guilty, the form of your verdict will be:

We find the defendants not guilty.

If part of the defendants are found guilty and part not guilty, the form of your verdict will be:

We, the jury, find the defendant or defendants (naming him or them) not guilty; and we find the defendant or defendants (naming him or them) guilty of murder, in manner and form as charged in the indictment, and we fix the penalty ———.

INSTRUCTIONS FOR THE DEFENDANTS.

1. The Jury are the Judges of the Law and Fact.—The jury are instructed for the defense as follows: The jury in a criminal case are, by the statute of Illinois, made judges of the law and evidence; and under these statutes it is the duty of the jury, after hearing the arguments of the counsel and the instructions of the court, to act upon the law and facts, according to their best judgment of such law and such facts.

2. The Jury Have a Right to Disregard the Instructions of the Court.—The jury are the judges of the law and the facts, and you have a right to disregard the instructions of the court, provided, you, upon your oath, can say that you believe you know the law better than the court.

3. The Law Presumes the Defendants Innocent.—The jury are instructed that the law presumes the defendants innocent in this case, and not guilty as charged in the indictment, and

the presumption should continue and prevail in the minds of the jury until they are satisfied by the evidence, beyond all reasonable doubt, of the guilt of the defendants; and acting on this presumption, the jury should acquit the defendants, unless constrained to find them guilty by the evidence convincing them of such guilt, beyond all reasonable doubt.

4. Reasonable Doubt Raised by Evidence or Ingenuity of Counsel.

—The court instructs the jury, that upon the trial of a criminal cause, if a reasonable doubt of any facts necessary to convict the accused is raised in the minds of the jury, by the evidence itself, or by the ingenuity of counsel, upon any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal.

5. A Verdict of Not Guilty Means that the Guilt has not been Proven.—A verdict of not guilty means no more than this: That the guilt of the accused has not been demonstrated in the precise, specific, and narrow forms prescribed by law. The evidence, to convict the accused, must not merely be beyond all reasonable doubt consistent with the hypothesis of his or their guilt, but it must also be beyond all reasonable doubt inconsistent with any hypothesis of innocence that can be reasonably drawn therefrom.

6. The Jury are not to Convict upon Mere Suspicion.—The court instructs the jury that, under the law, no jury should convict a citizen or citizens of crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him or them, or simply because there is a strong reason to suspect that he or they is or are guilty; but before the jury can lawfully convict, they must be convinced of the defendants' guilt beyond all reasonable doubt.

7. Burden of Proof is on the Prosecution.—The court further instructs the jury that in this case the law does not require of the defendants that they prove themselves innocent, but the law imposes upon the prosecution to prove that the defendants are guilty, in manner and form as charged in the indictment,

to the satisfaction of the jury, beyond all reasonable doubt; and unless they have done so the jury should find them not guilty.

8. **The Indictment only a Mere Accusation.**—The jury are further instructed, that the indictment in this case is of itself a mere accusation or charge against the defendants, and is not, of itself, any evidence of the defendants' guilt; and no juror in this case should permit himself to be, to any extent, influenced against the defendants, because or on account of the indictment in this case.

9. **Presumption of Innocence not a Mere Form.**—The jury are instructed further, that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendants in this case the full benefit of this presumption, and to acquit the defendants, unless they feel compelled to find them guilty as charged, by the law of the land and the evidence in the case, convincing them of their guilt, as charged, beyond all reasonable doubt.

10. **Every Material Allegation of the Indictment to be Proved Beyond a Reasonable Doubt.**—The jury are instructed, by the court, that in this case the burden of proof rests upon the prosecution to make out and prove to the satisfaction of the jury, beyond all reasonable doubt, every material allegation in the indictment, and unless that has been done the jury should find the defendants not guilty.

11. **Burden of Proof on the People, etc.**—The court further instructs the jury, that in this case, to justify a conviction of any one of the defendants, the burden is on the prosecution to prove, by creditable evidence, to the satisfaction of the jury, beyond all reasonable doubt, that such defendant is guilty, as charged in the indictment, of the murder of Matthias J. Degan; and if the evidence fails thus to satisfy the jury of the guilt of any one or more, or all of the defendants, it is the duty of the jury to acquit each and every of the defend-

ants, as to whom there is such failure of proof. The jury are not at liberty to adopt unreasonable theories or suppositions in considering the evidence, in order to justify a verdict of conviction, as to any defendant; but if any reasonable view of the evidence is or can be adopted, which admits of a reasonable conclusion, that the defendants, or any of them, are, or is, not guilty, as charged in the indictment, or which raises and sustains a reasonable doubt of said guilt, it is the duty of the jury to adopt such view of the evidence and acquit those to whom that conclusion applies.

12. The Reasonable Doubt, Defined.—A reasonable doubt is that state of the mind, which, after a full comparison and consideration of all the evidence, both for the state and defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding faith amounting to a moral certainty, from the evidence in the case, that the defendants are guilty of the charge as laid in the indictment. If you have such doubt—if your conviction of the defendants' guilt, as laid in the indictment, does not amount to a moral certainty from the evidence in the case—then the court instructs you that you must acquit the defendants.

13. Rule of Evidence Different from Civil Cases.—The court further instructs the jury that this is not a civil case, but it is a criminal prosecution; and that the rules, as to the amount of evidence in this case, are different from those in a civil case, and a mere preponderance of evidence would not warrant the jury in finding the defendants guilty, but before the jury can convict the defendants they must be satisfied of their guilt, beyond all reasonable doubt, and unless so satisfied, the jury should find the defendants not guilty.

14. If the Evidence Fails to Establish Guilt, etc., Jury Must Acquit.—The court instructs the jury, that in criminal cases, even where the evidence is so strong that it demonstrates the probability of the guilt of the parties accused, still if it fails to establish, beyond a reasonable doubt, the guilt of the defendants, or of one or more of them, in manner and form as charged in the indictment, then it is the duty of the jury to acquit any

defendant or defendants as to whose guilt they entertain such reasonable doubt.

15. Mere Probabilities not Sufficient to Warrant a Conviction.—The jury are instructed, that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that upon the doctrine of chances it is more probable that the defendants are guilty. To warrant a conviction of the defendants, or any of them, they must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which they can be innocent, when all the evidence in the case is considered together.

16. Personal Opinions not to be the Basis of Your Verdict.—Your personal opinions as to facts not proven cannot properly be considered as the basis of your verdict. You may believe, as men, that certain facts exist, but as jurors, you can only act upon evidence introduced upon the trial, and from that, and that alone, you must form your verdict, unaided, unassisted and uninfluenced by any opinions or presumptions not formed upon the testimony.

17. The Jury the Judges of the Credibility of Witnesses.—The court instruct the jury, that they are the sole judges of the facts in this case, and of the credit to be given to the respective witnesses who have testified; and in passing upon the credibility of such witnesses they have a right to take into consideration their prejudices, motives or feelings of revenge, if any such have been proven or shown by the evidence in this case; and if the jury believe, from the evidence, that any witness or witnesses have knowingly and willfully testified falsely as to any material fact or point in this case, the jury are at liberty, unless corroborated by other credible evidence, to disregard the testimony of such witness or witnesses in toto.

18. What is Sufficient to Raise a Reasonable Doubt.—The jury are instructed that if there is any one single fact proved

to the satisfaction of the jury, by a preponderance of evidence, which is inconsistent with the guilt of the defendants, or any of them, this is sufficient to raise a reasonable doubt, and the jury should acquit such of the defendants as to whom such fact has thus been proved.

19. **What will Justify Inference of Guilt from Circumstantial Evidence.**—That in order to justify an inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused upon any rational theory, and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

20. **Accomplices as Witnesses.**—The jury are instructed, that the witnesses, Gottfried, Waller and Wilhelm Seliger, are what is known, in law, as accomplices, and that, while it is a rule of law that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice, still, a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case, and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied, beyond any reasonable doubt, of its truth, and that they can safely rely upon it.

21. **Inducements Held out to Accomplices to be Considered.**—The jury are instructed that if they believe from the evidence that the witnesses, Gottfried, Waller and Wilhelm Seliger, were induced to become witnesses and testify in this case by any promise of immunity from punishment, or by any hope held out to them, or either of them, by any one, that it would go easier with them in case they disclosed who their confederates were, or in case they implicated some one else in the crime, then the jury should take such facts in consideration in determining the weight which ought to be given to their testimony thus obtained and given under the influence of such promise or hope.

22. **Persons Induced to Become Witnesses by Promises of Immunity.**—If the jury believe, from the evidence, that any of the witnesses for the prosecution were induced or influenced to become witnesses and testify in this case by any promise or intimation of immunity from punishment, or by any hope held out to them by any one that it would be better for them or go easier with them in case of their testifying in the case, then the jury should take such facts into consideration in determining the weight which ought to be given to such testimony thus obtained, and given under the influence of such promise or hope. Such testimony should only be received by the jury with great caution and scrutinized with great care.

23. **The Jury Should Act with Caution upon the Evidence of Accomplices.**—The court instructs the jury that, while it is the law of this state, that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice or accomplices, still, a jury should always act upon such testimony, if at all, with great caution and care, and subject it to critical examination, in the light of all the other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, they are satisfied, beyond any reasonable doubt, of its truth, and that they can safely rely upon it.

24. **Defendant's Omission to Testify Creates no Presumption against Him.**—The court instructs the jury, that while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him.

25. **The Jury Should Endeavor to Reconcile the Testimony of Defendants' Witnesses.**—The jury are instructed, that in passing upon the testimony of defendants' witnesses, in this case, they should endeavor to reconcile their testimony with the belief that all the witnesses have endeavored to tell the truth, if they can reasonably do so under the evidence, and if reasonably possible, attribute any differences or contradictions in their testimony, if any exist, to mistake or misrecollection, rather than to a willful intention to swear falsely.

26. **The Jury Have no Right to Disregard the Testimony of the Defendants.**—The jury have no right to disregard the testimony of the defendants on the ground alone that they are defendants and stand charged with the commission of a crime. The law presumes the defendants to be innocent until they are proved guilty, and the law allows them to testify in their own behalf, and the jury should fairly and impartially consider their testimony, together with all the other evidence in the case.

27. **Rule as to Verbal Admissions of Defendants.**—The court further instructs the jury, that when the verbal admission of a person charged with crime is offered in evidence, the whole of the admission must be taken together, as well that part which makes for the accused as that which may make against him, and if part of the statement, which is in favor of the defendants, is not disproved and is not apparently improbable or untrue, when considered with all the other evidence in the case, then such part of the statement is entitled to as much consideration, from the jury, as any other part of the statement.

28. **Improper for the Jury to Regard Statements of the Prosecuting Attorney.**—The jury are instructed, that it would be highly improper and wrong for them to regard any statements of the prosecuting attorneys that are not based on the evidence in the case, if any such have been made, as entitled to any weight whatever in this case.

29. **The Rule Where Conviction is Sought upon Circumstantial Evidence.**—The jury are instructed, as a matter of law, that where a conviction for a criminal offense is sought upon circumstantial evidence alone, the people must not only show by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation, upon any reasonable hypothesis other than that of the guilt of the accused. And in this case, if all the facts and circumstances relied on by the people to secure a conviction can be reasonably accounted for upon any theory consist-

ent with the innocence of the defendants, or any of them, then the jury should acquit the defendants, or such of them as to whom the facts proven can thus be accounted for.

30. Proof that the Defendants Contemplated the Commission of the Crime, not Enough to Warrant Their Conviction.—It is not enough to warrant the conviction of a person accused of crime, that he contemplated the commission of such crime. The actual commission of such crime by the accused, or the proof of such facts as will satisfy the jury, beyond all reasonable doubt, of the guilt of the accused, must be presented, and if any reasonable hypothesis exists that such crime may have been committed by another in no way connected with the defendants, the accused should be acquitted.

31. The Rule Where the Evidence Shows Conduct of no Less Turpitude than the Crime Charged.—The jury are further instructed, that if the evidence leaves a reasonable doubt in the mind of the jury, whether the defendants are guilty of the crime with which they are charged in the indictment, then the jury should find the defendants not guilty; although the evidence may show conduct of no less turpitude than the crime charged, that is not enough to authorize a conviction in this trial.

32. Allusions and References of the Prosecuting Attorney to Dangerous Views Entertained by Defendants.—The court further instructs the jury, that the allusions and references of the prosecuting attorneys to the supposed dangerous character of any views entertained, or principles contended for, by the defendants, or any of them, should, in no way, influence or prejudice your minds against the defendants in this case; your duty is discharged when you have determined their guilt or innocence of the charge contained in this indictment, and there is no other question involved in this case.

33. The Right to Arm for Defense and Protection.—Individuals and communities have the legal right to arm themselves for the defense and protection of their persons and property, and a proposition by any person publicly proclaimed to arm for such protection and defense is not an offense against the laws of this state.

34. **Right to Repel an Illegal Attack by Force.**—The jury are instructed, that if the defendants, or some of them, agreed together or with others, that in the event of the workmen or strikers being attacked, they (defendants) would assist the strikers to resist such attack, before you can find that such agreement constituted a conspiracy, you must be satisfied, beyond all reasonable doubt, that such contemplated or anticipated assault or attack to be resisted, as aforesaid, was justified and lawful, and that such contemplated resistance was illegal. And if, on the other hand, such contemplated or anticipated assault or attack was unjustified and illegal, and such contemplated resistance simply the opposing of force, wrongfully and illegally exercised, by force sufficient to repel the said assault, then the facts assumed in this instruction do not constitute conspiracy.

35. **Burden Not on the Defendants to Show Who Threw the Bomb.**—The defendants do not assume the burden of proof in this case at any stage of the proceedings, and the burden is not cast upon them to prove that the person who threw the bomb was not acting under their advice, teaching or procurement; therefore, unless the prosecution has established in the minds of the jury, beyond all reasonable doubt, that some of the defendants threw the said bomb, or that the person who did so throw the same was acting under the advice and procurement of the defendants, or some of them, the defendants, and all of them, should be acquitted. Such advice may not necessarily be as to the bomb, but generally, so as to include it.

36. **There Must Be a Direct Connection between the Advice and the Consummation of the Crime.**—It will not do to guess away the lives or liberty of the people, nor is it proper that the jury should guess that the person who threw the bomb which killed Degan was instigated to do the act by the procurement of the defendants, or any of them; that fact must be established beyond all reasonable doubt in the minds of the jury, and it will not do to say that because the defendants may have advised violence, therefore, when violence came, it was the result of such advice. There must be a direct connection established, by credible testimony, between the advice and the

consummation of the crime, to the satisfaction of the jury beyond a reasonable doubt.

37. The Person Who Threw the Bomb Must Have Been Acting under the Teaching of the Defendants, etc.—Although the defendants, or some of them, may have spoken, written or published their views to the effect that a social revolution should be brought about by force, and that the officers of the law should be resisted, and to this end dynamite should be used to the extent of taking human life; that persons should arm to resist the law, and that the law should be throttled and killed, and although such language might cause persons to desire to carry out the advice given, as aforesaid, and do the act which caused officer Degan's death, yet the bomb might have been thrown and Degan killed by some one unfamiliar with, and unprompted by the teachings of the defendants, or any of them.

Therefore the jury must be satisfied, beyond all reasonable doubt, that the person throwing said bomb was acting as the result of the teaching or encouragement of the defendants, or some of them, before the defendants can be held liable therefor, and this you must find from the evidence.

38. Not Liable for the Throwing of the Bomb Unless it was in Furtherance of the Common Design.—If you find at a meeting, held May 3d, at 54 W. Lake street, at which some of the defendants were present, it was agreed, that in the event of a collision between the police, the militia or firemen and the striking laborers, certain armed organizations, of which some of the defendants were members, should meet at certain places in Chicago, that a committee should attend public places and meetings where an attack by the police and others might be expected, and in the event of such attack, report the same to said organization to the end that such attack might be resisted and the police stations of the city destroyed, still, if the evidence does not prove, beyond all reasonable doubt, that the throwing of the bomb which killed Matthias J. Degan, was the result of any act in furtherance of the common design herein stated, and if it may have been the unauthorized and individual act of some person act-

ing upon his own responsibility and volition, then none of the defendants can be held responsible therefor on account of said West Lake street meeting.

INSTRUCTIONS GIVEN BY THE COURT ON ITS OWN MOTION.

1. **Instructions to be in Writing—Practice.**—The statute requires that instructions by the court to the jury shall be in writing and only relating to the law. The practice under the statute is, that the counsel should prepare, on each side, a set of instructions and present them to the court, and, if approved, to be read by the court as the law of the case.

2. **Jury to Scrutinize all Instructions.**—It may have been, by reason of the great number presented, and the hurry and confusion in the midst of the trial, with a large audience to keep in order, that there should be some apparent inconsistency, but if they are carefully scrutinized such inconsistency will probably disappear; in any event, however, the gist or pith of all is, that if advice and encouragement to murder was given, and if murder was done in pursuance of and immediately induced by such advice and encouragement, then those who gave such advice and encouragement are guilty of murder.

3. **General Rule of Law Applying to the Case.**—If the evidence, either direct or circumstantial, or both, proves the innocence of one or more of the defendants so fully that there is no reasonable doubt of it, then your duty to them requires you to acquit them. If it does so prove them guilty, then your duty to the state requires you to convict whoever is so proved guilty. The acts of each defendant should be considered with the same care and scrutiny as if he alone were on trial. If a conspiracy having violence and murder as its object is fully proved, then the acts and declarations of each conspirator in furtherance of the conspiracy are the acts and declarations of each one of the conspirators; but the declarations of any conspirator before or after May 4th, which are merely narrative as to what has been or would be done, and not made to aid in carrying into effect the object of the conspiracy, are only evidence against the one who makes them. What was the fact

and what are the facts the jury must determine from the evidence, and from that alone. If there are any unguarded expressions in any of the instructions which seem to assume the existence of any facts, or to be any intimation as to what is proved, all such expressions must be disregarded and the evidence only looked to to determine the fact.

INSTRUCTION ON MANSLAUGHTER GIVEN FOR THE DEFENDANTS.

1. Manslaughter Defined—Jury May Find Defendants Guilty of Manslaughter.—The court instructs the jury, in the words of the statute, that manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation whatever. It must be voluntary on the sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible, and involuntary in the commission of the unlawful act, or without willful act and without due cause or circumspection. Whoever is guilty of manslaughter, shall be imprisoned in the penitentiary for his natural life or for any number of years. If the accused is found guilty by the jury, they should fix the punishment by their verdict. The jury are instructed that under an indictment for murder, a part of the accused may be found guilty of manslaughter; and if, in this case, after a full and careful consideration of all the evidence before you, you believe, beyond a reasonable doubt, that the defendants, or any one of them, are guilty of manslaughter, you may so find by your verdict.

CHAPTER LVII.

INTOXICATING LIQUORS.

SALES GENERALLY.

- SEC. 1. What constitutes the offense.
2. Burden of proof as to license.
3. One sale, delivered at different times.
4. Sales by servant or employe.
5. When not liable for the act of the servant.
6. Charge must be proved as alleged.
7. Sales by alleged agent—Agency must be proved.
8. Single transaction one offense.

SALES TO MINORS.

9. The offense.
10. Burden of proof as to written order.
11. Knowledge of minority immaterial.
12. Knowledge and intent material.

SELLING TO PERSONS IN THE HABIT OF GETTING INTOXICATED.

- SEC. 13. The offense.
14. Meaning of the term "in the habit."
15. Intent necessary.
16. Knowledge or criminal intent necessary.
17. The habit must exist at the time.
18. In the habit of drinking, not enough.
19. Drunkenness defined.

SALES GENERALLY.

§ 1. What Constitutes the Offense.—The court instructs the jury, that in order to find the defendant guilty, it is only necessary that the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, either by himself, his agent or servant, within (*eighteen*) months before the day of, etc., at and within the county of W., sold or gave away intoxicating liquors in less quantities than, etc., the said defendant not having a license to sell the same. It is not necessary to prove that the sale or giving away was on the day laid in

the indictment, nor that the defendant himself actually dealt out the liquor.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, either as principal or as clerk, servant or bar-tender, sold or gave away intoxicating liquor in less quantity than, etc., within this county, and within (*eighteen*) months before the finding of this indictment, without having first obtained a license therefor, as charged in the indictment, then the jury should find the defendant guilty.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, either by himself or by another person, as his agent or servant, sold or gave away intoxicating liquors in less quantities than, etc., in manner and form as charged in the indictment, then the jury should find the defendant guilty upon as many of the counts of the indictment as there are of such sales or giving away of liquor so proven.

§ 2. **Burden of Proof as to License.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant by himself, agent or servant, made the sales, as charged in the indictment, then it is not necessary for the people to show, by proof in the first instance, that he had no license to sell intoxicating liquors. That is a matter of defense, and should be proved by the defendant if he had such license. *Potter vs. Deyo*, 19 Wend., 361; 1 Greenl. Ev., § 79; *Smith vs. Joice*, 12 Barb., 21; Wharton Crim. L., 2434; *Pendergrast vs. Peru*, 20 Ill., 51; *Gerring vs. State*, 1 McCord, 573; *Contra: Mehan vs. State*, 7 Wis., 670

§ 3. **One Sale Delivered at Different Times.**—If the jury believe, from the evidence, that the defendant, on the occasion testified to by the witnesses, sold to the said A. B. (one gallon) and no less, and that the quantity so sold was drawn from the cask and placed in a keg (or bottles) separate by itself and set away for the said A. B. as his property and charged to him (or paid for by him), then in such case the title to the whole quantity so sold and set apart passed to the purchaser, although he may have taken away but a part of it at the time of the sale, and in such case it is a matter of no consequence what may have been the motives of the parties in making such sale,

and the jury should find for the defendant. *Dobson vs. State*, 57 Ind., 69.

§ 4. **Sales by Servant or Employee.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant was keeping a saloon, at the time in question, at S., in this county, and that the witnesses who have testified in this case, or any of them, obtained intoxicating liquors at such saloon in less quantities than, etc., within (*eighteen*) months before the finding of this indictment, then the defendant is liable, whether such liquor was furnished by himself or by his employe or bartender; provided, the jury further believe, from the evidence, that the defendant, at the time, had no license to sell such liquors.

If the jury believe, from the evidence, beyond a reasonable doubt, that intoxicating liquors were obtained at the saloon, etc., as claimed by the prosecution, and that the saloon where such liquors were obtained belonged to the defendant, and was at the time in his possession, or under his control, then, if there is no evidence to the contrary, the presumption of law would be that the liquors so obtained were sold by the defendant, either by himself, his agent or servant.

§ 5. **When not Liable for Act of Servant.**—If a clerk or bar-keeper in a saloon sell intoxicating liquor, without the knowledge and against the instructions of his employer, the latter is not criminally responsible for the act. *Lathrop vs. State*, 51 Ind., 192; *Com. vs. Putnam*, 4 Gray, 16.

Though the jury may believe, from the evidence, that the said A. B. obtained intoxicating liquors at defendant's place of business from one W., who was then acting as the agent or servant of defendant, as alleged, still, if the jury further believe, from the evidence, that before that time the defendant had instructed the said agent or servant, in good faith, not to sell or give away intoxicating liquors, and with a *bona fide* intent to have such instructions obeyed, and further, that the said W., in selling or giving away said liquors, was acting in violation of said instructions, and against the wishes of the defendant, then the jury should find the defendant not guilty of the sale so made.

A sale by an agent, against the known will and instructions of his principal, will not render the principal liable. *Ander-son vs. State*, 22 Ohio St., 305.

Although the jury may believe, from the evidence, that the bar-tender of the defendant sold intoxicating liquor to the said A. B., as charged in the indictment, and that the said A. B. was at the time a person in the habit of getting intoxicated, still, if the jury further believe, from the evidence, that such sale was without the knowledge or consent of the defendant, and against his wishes, then the defendant would not be liable therefor, and the jury have no right to presume that the defendant authorized his bar-tender to make such sale simply because he was employed as bar-tender at defendant's saloon; if the jury find there is no evidence to the contrary, the presumption of law is, that the bar-tender only had authority from the defendant to make such sales as were lawful. *State vs. Mahoney*, 23 Minn., 181.

§ 6. Charge Must be Proved as Alleged.—The jury are instructed, that the crime charged against the defendant in the indictment in this case, is that of having sold intoxicating liquors without a license to sell the same; and unless the prosecution has proved some one or more of the sales charged in the indictment, beyond a reasonable doubt, the jury should find the defendant not guilty.

Unless the jury believe, from the evidence, beyond a reasonable doubt, that the defendant made some one or more of the sales charged against him, either as principal, agent, clerk or servant, within (*eighteen*) months before the finding of the indictment in this case, then the jury must find the defendant not guilty.

The jury are instructed, that in this case it is not indispensable for the people to show that the defendant himself actually sold or furnished the liquors in question to (*the witnesses*). It is sufficient, if the jury believe, from the evidence, beyond a reasonable doubt, that the liquors were sold as charged in the indictment by the defendant, or his agents or servants, at any time within (*eighteen*) months before the finding of the indictment, and that at the time the defendant had no license to sell intoxicating liquors.

§ 7. **Sales by Alleged Agent—Agency must be Proved.**—Although the jury may believe, from the evidence, that one A. B., at the time and place alleged, did unlawfully sell intoxicating liquors, still, unless the prosecution have proved by evidence so as to satisfy the jury, beyond any reasonable doubt, that the said A. B. when he made such sales was acting as the agent, clerk, bar-tender or servant of the defendant, then, as to such sales made by the said A. B., the jury should find the defendant not guilty.

§ 8. **Single Transaction One Offense.**—The jury are instructed, that where two or more glasses of intoxicating liquor are called for by one person, and are sold at one time as part of the same transaction, and all paid for by the same person, such transaction constitutes but one selling within the meaning of the law under which this prosecution is brought.

SALE TO MINORS.

§ 9. **Sale to Minors.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant, by himself, agent or servant, within (*eighteen*) months before the finding of the indictment in this case, within this county, sold or gave away any intoxicating liquor to A. B., and that at that time the said A. B. was under the age of twenty-one years, and further, that such sale was made without a written order of the parents, guardian or family physician of the said A. B. then the jury should find the defendant guilty under the ——— count of the indictment.

§ 10. **Burden of Proof as to Written Order.**—The jury are instructed, that all that is necessary for the prosecution to prove, in order to warrant a conviction in this case, is to satisfy the minds of the jury by the evidence, and beyond any reasonable doubt, that the defendant, by himself, agent or servant, at and within this county, within (*eighteen*) months before the finding of this indictment, sold or gave intoxicating liquors to either of the parties, as charged in the indictment, and that, at that time, the person to whom the sale was made, or the liquor given, was a minor under the age of twenty-one

years; provided, the defendant has failed to show that he had a written order, etc.

The fact of the defendant having a written order from parents, guardian or family physicians authorizing a sale to a minor, is a matter of defense, and if the people have proved to the jury by the evidence, beyond a reasonable doubt, the sale or giving of intoxicating liquors to a minor, as charged in the indictment, then the jury should find defendant guilty; unless the jury believe, from the evidence, that at the time of such sale he had such written order. *State vs. Cornan*, 48 Ia., 567.

§ 11. **Knowledge of Minority Immaterial.**—The jury are instructed, that if they believe, from the evidence, that the defendant by himself, his agent or servant, sold or gave intoxicating liquor to the said A. B., and that the said A. B. was at that time a minor, under the age of twenty-one years, then it is wholly immaterial whether the defendant knew, or did not know, that the said A. B. was a minor, nor whether the said defendant was himself deceived in regard to the age of the said minor. A person engaged in the business of selling intoxicating liquors, sells to a minor at his peril, and is equally guilty whether he knows, or does not know, the age of the person to whom he is selling. *State vs. Hartfield*, 24 Wis., 60; *Com. vs. Emmons*, 98 Mass., 6; 3 Greenl. Ev., § 21; *State vs. Cain*, 9 W. Va., 559; *Com. vs. Finnegan*, 124 Mass., 324; *Roborge vs. Burnham*, 124 Mass., 277; *McCutcheon vs. People*, 69 Ill., 601.

§ 12. **Knowledge and Intent Material.**—The jury are instructed, as a matter of law, that intent is necessary to the commission of a crime, and it is a good defense to a charge of selling intoxicating drink to a minor, that the dealer had good reason to believe, and did believe him to be of age. Whether in this case the defendant did sell to a minor, and whether he took reasonable care to find out whether the said A. B. was a minor, and whether he, in good faith, believed him to be over the age of twenty-one years, are questions of fact to be determined by the jury, from the evidence in the case. *Faulker vs. People*, 39 Mich., 200; *Robbins vs. State*, 63 Ind., 235;

Anderson vs. State, 22 St. Ohio, 305; *Adler vs. State*, 55 Ala., 16.

SELLING TO A PERSON IN THE HABIT, ETC.

§ 13. **Selling to a Person in the Habit, etc.**—The court instructs the jury, that by the laws of this state it is unlawful for any person, by himself, or by his agent or servant, to sell or give intoxicating liquor to a person when he is intoxicated, or to a person who is in the habit of getting intoxicated.

The jury are instructed, that if they believe, from the evidence, beyond a reasonable doubt, that the defendant either in person or by his agent or servant, within (*eighteen months*) before the finding of the indictment in this case, sold or gave to A. B. intoxicating liquor, and further, that the said A. B., at the time of such selling or giving, was a person in the habit of getting intoxicated, then the jury should find the defendant guilty.

§ 14. **Meaning of the Words "in the Habit of Getting Intoxicated."**—The court further instructs the jury, that in giving a construction to the statute under which this indictment was found, the jury should give to the words "in the habit of getting intoxicated," their common ordinary signification and meaning; the words mean in the law just what they mean in common, ordinary conversation.

§ 15. **Intent Necessary.**—Although the jury may believe, from the evidence, that the defendant sold intoxicating liquors to the said A. B., as charged in the indictment, and that the said A. B. was at the time a person in the habit of getting intoxicated, still if the jury further believe, from the evidence, that before making such sale, defendant made inquiry of persons well acquainted with the said A. B., as to whether he was in the habit of getting intoxicated, and was told that he was not, and that the defendant used reasonable care before selling said liquor, in good faith, to ascertain whether the said A. B. was in the habit of getting intoxicated, and that when he sold the said liquor he honestly and in good faith believed that the said A. B. was not in the habit of getting intoxicated, then

the jury should find the defendant not guilty. *Crabtree vs. State*, 30 Ohio St., 382.

§ 16. **Knowledge or Criminal Intent Necessary.**—The jury are instructed, that if they believe, from the evidence, beyond a reasonable doubt, that the defendant sold or gave to the said A. B., intoxicating liquor, as charged in the indictment, and that the said A. B. was, at the time, in the habit of getting intoxicated, then it is wholly immaterial whether the defendant knew or did not know that the said A. B. was a person in the habit of getting intoxicated. A person engaged in the business of selling intoxicating drinks, selling to a person who is in the habit of getting intoxicated, sells at his peril, and he is equally guilty whether he does or does not know the habits of the person to whom he is selling. *Barnes vs. The State*, 19 Conn., 397.

§ 17. **Habit Must Exist at the Time, etc.**—The jury are instructed, that although they may believe, from the evidence, beyond a reasonable doubt, that the said A. B. was at one time addicted to the use of intoxicating liquor, so as to be in the habit of getting intoxicated, still, if the jury further find, from the evidence, that before the time of the alleged sale in question in this suit the said A. B. had reformed, or partially reformed, his habits in that respect, and was not, at the time in question, in the habit of getting intoxicated, then the jury should find the defendant not guilty.

The court instructs the jury, that unless the prosecution have proved, by the evidence, to the satisfaction of the jury, beyond a reasonable doubt, that the said defendant did, by himself, agent or servant, sell or give to the said A. B. intoxicating liquors, and also that the said A. B. was, at the time of such sale or giving away, a person then in the habit of getting intoxicated, the jury should find the defendant not guilty.

The court further instructs the jury, on the part of the defendants, as a matter of law, that before they can convict the defendants they must believe, from the evidence, beyond a reasonable doubt, that the person named in the indictment had been in the habit of getting intoxicated at the time

of the alleged sale, and whether he was or not in such habit is a question for the jury to determine, from all the evidence in the case. *Gallagher vs. The People*, 11 N. E. Rep., 335; 120 Ill., 179.

§ 18. **In the Habit of Drinking, Not Enough.**—The jury are instructed, that it is not enough to warrant a conviction in this case, that it shall appear, from the evidence, beyond a reasonable doubt, that the said A. B. was a person in the habit of drinking intoxicating liquors at the time in question; it must appear not only that he was in the habit of drinking intoxicating liquors, but that he was, at the time, drinking them to such an excess as to be in the habit of getting intoxicated.

§ 19. **Drunkenness Defined.**—The court instructs the jury that a man is drunk in a legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired by the liquor. *State vs. Pierce*, 65 Ia., 85; 1 Bouv. Law Dic., 510.

CHAPTER LVIII.

LARCENY.

- SEC. 1. Larceny defined.
2. Value of property stolen must be proved.
3. Name of the owner, etc., must be proved.
4. Special property sufficient.
5. Identity of the accused must be established.
6. Criminating circumstances.
7. Person having possession of property must be produced.
8. What constitutes a taking and carrying away.
9. Lost property found.
10. Estrays, larceny of.
11. Taking must be with felonious intent.
12. Taken under claim or right of title.
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18. Meaning of the term.
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DIFFERENT DEGREES OF LARCENY.

25. Rule for finding value of property.
26. Form of verdict—Illinois.

LARCENY.

§ 1. **Larceny Defined.**—The court instructs the jury, that larceny is the felonious stealing, taking and carrying away of the personal goods, money, bond, bill, note or other personal property of another.

§ 2. **Value Must be Proved.**—That among the material averments contained in the indictment necessary to be proved in order to warrant a conviction, is the one that the property alleged to have been stolen had some value, and if the prosecution have failed to prove, affirmatively, some value to said property, then it is the duty of the jury to acquit the accused. A simple statement of counsel as to the value of the property will not suffice; it must be proved in some of the ways known to the law, or the verdict should be not guilty. *State vs. Krieger*, 68 Mo., 98.

§ 3. **Name of the Person Injured Must be Proved.**—The court instructs the jury, that it is essential in all criminal prosecutions, that the name of the party injured should be proved, as charged in the indictment; and, if the proof shows in this case, that the property stolen belonged to C. B. and not to A. B., as charged in the indictment, the jury must acquit the defendant.

It is necessary for the prosecution to prove the ownership of the property, as alleged in the indictment; and, unless the jury believe, from the evidence, that the said A. B. was the owner of the (*horse*), mentioned in the indictment, the jury must find the defendant not guilty. *McBride vs. Com.*, 13 Bush. (Ky.), 337; *Robinson vs. State*, 5 Tex. App., 519.

§ 4. **Special Property Sufficient.**—As to the ownership of the property, the court instructs the jury, that if the said C. D. had the actual care, custody and right to use the said (*horse*), and was in the actual possession at the time of the alleged taking, not as the agent or servant of the real owner, this would be, for the purposes of this trial, sufficient evidence of ownership to sustain the allegation in the indictment, that he was the owner. *Crockett vs. State*, 5 Tex. App., 526.

§ 5. **Identity of the Accused.**—If the jury are satisfied from the evidence, beyond a reasonable doubt, that a larceny was committed in manner and form as charged in the indictment by some one or more of the defendants, and that this was done in pursuance of a common purpose entertained by all for the benefit of all, and according to a plan or scheme contrived or

agreed upon by all of the defendants, then the jury will be warranted in finding them all guilty, although you may be in doubt as to the identity of the particular defendant who actually took and carried away the property in question. *Neville vs. State*, 60 Ind., 308.

§ 6. **Criminating Circumstances.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the prosecuting witness, A. B., had money in his possession, of the kind and character mentioned in the indictment, and that the same was stolen from him, in manner and form as charged in the indictment, and that the defendant had an opportunity to steal the same, at and about the time it is alleged to have been stolen, and that shortly thereafter the defendant was seen to be spending the same kind of money lavishly, and for articles of ornament and luxury, apparently unsuited to his circumstances and condition in life, then these are circumstances tending to show the guilt of the defendant, and should be considered by the jury in connection with all the other evidence in the case, in determining the guilt or innocence of the defendant, unless he has given a satisfactory account of how he obtained the money which he was spending.

§ 7. **Person Having Possession of Property must be Produced.**—It is a rule of law, that when property is, by the owner, placed in the care and custody and under the control of another, and such property is alleged to have been stolen from the possession of such other person, then, if it is in the power of the prosecution to produce the person, so having such possession, as a witness, he must be produced, in order to show that the property was not taken with his consent; and, in such case, the evidence of such person cannot be supplied by other proof, nor can the accused be convicted without it. 2 Russ. on Crim., 122; *State vs. Osborne*, 28 Iowa, 9.

§ 8. **What Constitutes Taking and Carrying Away.**—To constitute larceny there must be a felonious taking and carrying away of the property mentioned in the indictment or some part of it but it is not necessary that the property should be carried or removed to any particular distance from the place

where it is taken, and in this case, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant took the property mentioned in the indictment or any part of it from the place where it was left by the owner and concealed the same (in the same room or building) with intent to steal the property so taken, this would be a sufficient taking and carrying away of the property to constitute the crime of larceny. *Nutzel vs. State*, 60 Ga., 264; *State vs. Green*, 81 N. C., 560.

§ 9. **Lost Goods Found.**—The law is that if a man finds goods that are actually lost or are reasonably supposed by him to have been lost, and he appropriates them to his own use with intent to take entire dominion over them as his own, this is not larceny, provided he believes, and has good reason to believe, that the owner cannot be found. *Baker vs. The State*, 29 Ohio St., 184; Wharton Crim. Law, 650; 1 Bishop Crim. Law, § 419.

The finder of lost property is not bound to make any search for the owner. He is under no legal obligation to advertise it in a newspaper or to search the papers to see if the loss has been advertised. And, although the jury may believe, from the evidence, that the said A. B. lost the property mentioned in the indictment, and that the defendant found the same, and afterwards converted it to his own use, still, if you further believe, from the evidence, that at the time he so found it there was nothing in the nature of the property, or in the circumstances under which it was found, to indicate to the defendant who the owner was, or where he could be ascertained, and that the defendant, at the time he found the property, did not intend to steal the same, then you should find him not guilty, although you may believe that he afterwards purposely concealed the fact that he had found the property and converted it to his own use. *Brooks vs. State*, 35 Ohio St., 46.

It is not necessary, to the conviction of the defendant, that he should have known, or have had reason to believe he knew, the particular person who owned the property at the time of the alleged finding; or that he should have had the means of identifying the owner immediately, at that time. If the jury believe, from the evidence, beyond a reasonable doubt, that the prosecuting witness A. B. was the owner of the prop-

erty described in the indictment, and that the defendant found the same, and that at the time of the finding he had reasonable ground to believe, from the nature of the property, or from the circumstance under which he found it, that if he did not conceal the fact that he had found it, but dealt honestly with it, the owner would appear or be ascertained, then, if he purposely concealed the fact that he had found the property, he would be guilty of larceny; provided, the jury further believe, from the evidence, that at the time the defendant first took the property into his possession, he intended to convert it to his own use. *Brooks vs. State*, 35 Ohio St., 46.

§ 10. **Larceny of Estrays.**—If the jury find, from the evidence, beyond a reasonable doubt, that the animal mentioned in the indictment was an estray, and that the defendant took it into his possession, or found it running with his stock and took care of and fed it with his own stock, and that when he first got it into his possession he did not intend to steal it or feloniously convert it to his own use, then he would not be guilty of the crime of larceny, although you may find, from the evidence, beyond a reasonable doubt, that he afterwards killed the animal and converted it to his own use, with intent to deprive the owner of it. *Starch vs. State*, 63 Ind., 283; *Griggs vs. State*, 58 Ala., 425.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant took the animal mentioned in the indictment into his possession while the same was running in the public highway, and that at the time he so took the animal he knew it was not his own, and that he intended then to steal and convert it to his own use and to deprive the owner of his property, whoever he might be, and that in pursuance of such intention he afterwards killed the animal and converted it to his own use, this would amount to the crime of larceny; provided, you find all the other allegations of the indictment proved, by the evidence, beyond a reasonable doubt. *Starch vs. State*, 63 Ind., 283; *State vs. Martin*, 28 Mo., 530; *Com. vs. Mason*, 105 Mass., 163.

§ 11. **Taking must be with Felonious Intent.**—The court instructs the jury, that every unlawful taking of the goods and

chattels of another, without his knowledge or consent, does not amount to a larceny; to make it such, the taking must be such, and accompanied by such circumstances, as show a felonious intent, that is, an intent to steal the property. *Mason vs. State*, 32 Ark., 238; *Hart vs. State*, 57 Ind., 102; *Com. vs. Hurd*, 123 Mass., 438.

Even though the jury may believe, from the evidence, that the money in question was taken from the said A. B. contrary to his will and without his knowledge, still, if the evidence shows that the defendant, when he obtained the money, did not intend to steal it, but took it only for safe keeping, intending to return the same to the owner, then the jury should acquit the defendant.

The court instructs the jury, that every unlawful taking and carrying away of the personal goods of another, will not amount to larceny; to constitute larceny, a felonious intent must be shown to have accompanied the original taking; that is, the goods must have been taken with an intent to steal the same. *State vs. Wood*, 46 Ia., 116; *Humphrey vs. State*, 63 Ind., 223.

§ 12. **Taken under Claim of Right or Title.**—The jury are further instructed, that although they may believe, from the evidence, beyond a reasonable doubt, that the defendant took and carried away the property in question, as charged in the indictment, still, if they further believe, from the evidence, that the defendant took the property under a claim of title honestly entertained, then he is not guilty of larceny; and, in such case, it makes no difference whether he did, in fact, have any legal right to the possession of the property or not. *State vs. Bond*, 8 Clarke (Ia.), 540; 2 Whar. on Crim. Law, § 1770.

The intent being necessary to complete the crime of larceny, if a person, under the honest impression that he has a right to the property, said to have been stolen, takes it into his possession under such claim of right, this would not be larceny; and, in this case, if the prosecution have failed to prove, beyond a reasonable doubt, that the property in question was taken by the defendant, knowing, at the time, that it was the property of another, and with the intention of feloniously

converting the same to his own use, then it is your duty to acquit the defendant.

The court further instructs the jury, that where property is taken under a claim of right, and there be any fair pretense of right to the property, and the jury believe, from the evidence, that such claim is made in good faith, then it is the duty of the jury to find the defendant not guilty.

Although you may believe, from the evidence, that the defendant would be liable in an action of trespass for the value of the property in question, still, unless the prosecution have proved, beyond a reasonable doubt, that the defendant feloniously stole the same, then you must acquit the defendant.

§ 13. **Possession Obtained by Fraud with Intent, etc.**—If the jury believe, beyond a reasonable doubt, that the defendant, at or about the time stated in the indictment (at the saloon of E. M.), in this county, by any fraudulent means or representation, induced the said A. B. to take out his money, and that, in consequence thereof, the said A. B. did take out his money, and that in pursuance of such intent, the said defendant did then and there feloniously steal, take and carry away said money, in manner and form as charged in the indictment, then the jury should find the said defendant guilty of larceny.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant obtained the possession of the money, described in the indictment, fraudulently and with an intent then and there to steal the same, and of feloniously converting the same to his own use, in manner and form as charged in the indictment, then this in law would amount to a larceny, notwithstanding the said A. B. knowingly and intentionally parted with the possession of the money. 3 Greenl. on Evi., § 160; 2 Whar. on Crim. Law, § 1787.

§ 14. **Money Must be Proved to be Genuine.**—The jury are instructed, that to warrant a conviction under this indictment, the jury must believe, from the evidence, that one or more of the treasury notes, bank bills or other money, alleged to have been taken by the defendant, was a genuine bill or note; and if the jury find that the people have failed to produce any proof of the genuineness of such treasury note, bank bill or other

money, and that there is no such evidence before the jury, then the jury should find the defendant not guilty. *Collins vs. The People*, 39 Ill., 233; 1 Starkie on Evidence, 829, note.

§ 15. **Possession of Stolen Property.**—The court instructs the jury, that the possession of stolen property recently after the theft by the person charged, if unexplained, is a circumstance tending to prove his guilt; and if the jury believe, from the evidence, that the defendant was found with the stolen property in his possession, then, in determining the weight to be attached to that circumstance, as tending to prove guilt, the jury shall consider all the circumstances attending such possession—the proximity of the place where found to the place of the larceny; the lapse of time since the property was taken; whether the property was concealed; whether the party admitted or denied the possession; the demeanor and character of the accused; whether other persons had access to the place where the property was found. All these circumstances, so far as they have been proved, are proper to be taken into account by the jury in determining how far the possession of the property by the accused, if it has been proved, tends to show his guilt. 3 Greenl. Evi., § 32; *Conkright vs. The People*, 35 Ill., 204; *State vs. Hodge*, 50 N. H., 510.

The court instructs the jury, that the possession of recently stolen property is usually regarded, in law, as a criminating circumstance, strongly tending to show that the possessor stole the property, unless the facts and circumstances surrounding or connected with such possession, or other evidence, explains or shows such possession might have been acquired honestly. Possession of stolen property, immediately after the theft, is sufficient to warrant a conviction, unless attending circumstances, or other evidence, so far overcomes the presumption thus raised as to create a reasonable doubt of the prisoner's guilt, when an acquittal should follow. *Sahlinger vs. The People*, 102 Ill., 241; *Fowle vs. State*, 47 Wis., 545; *State vs. Pennyman*, 68 Ia., 216; *Johnson vs. Miller*, 29 N. W. Rep., 743.

In this case, if the jury believe, from the evidence, beyond a reasonable doubt, that the property described in the indict-

ment was stolen, and that the defendant was found in the possession of the property soon after it was stolen, then such possession is, in law, a strong criminating circumstance, tending to show the guilt of the defendant, unless the evidence, and the facts and circumstances proved, show that he may have come honestly in possession of the same. *Smith vs. State*, 58 Ind., 340; *Watkins vs. State*, 2 Tex. App., 73.

§ 16. **Possession Explained.**—The court instructs the jury, that while possession of stolen property recently after the theft, if unexplained, is a circumstance tending to show the guilt of the possessor, still, in this case, if the jury believe, from the evidence, that the defendant bought the property in question at, etc., openly and publicly, and unconnected with any suspicious circumstances of guilt, this is a satisfactory account of his possession of the property, and removes every presumption of guilt growing out of such possession. *Jones vs. The People*, 12 Ill., 259.

§ 17. **Petit Larceny, Second Offense—Illinois Statute.**—The court instructs the jury, as a matter of law, that in case of a second conviction of the offense of petty larceny, by any person over the age of eighteen years, the punishment shall be by imprisonment in the penitentiary, for a term not exceeding three years; and on the trial under an indictment for petty larceny, a duly certified copy of the record of a former conviction and judgment of any court of record in this state for a like offense against the party indicted, shall be *prima facie* evidence of such former conviction, and may be used in evidence against such party; provided, that such former conviction and judgment shall be set forth in apt words in the indictment.

LARCENY AS BAILEE—EMBEZZLEMENT.

§ 17. **Meaning of the Term.**—The court instructs the jury, that the meaning of the word embezzlement is the fraudulently removing or secreting personal property, with which a party has been intrusted, for the purpose of applying it to his own use. There can be no embezzlement, within the legal mean-

ing of the word, unless the party, when he takes the property or money, does it secretly, with an intent to defraud the owner. *People vs. Hurst*, 28 N. W. Rep., 838.

The court instructs the jury, as a matter of law, that if any bailee of any bank bill, note, money or other property, shall convert the same to his own use, with intent to steal the same, or secretes the same with intent so to do, he shall be deemed guilty of larceny. (Illinois.)

The court instruct the jury, as a matter of law, that whoever embezzles or fraudulently converts to his own use, or secretes, with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny. (Illinois.)

§ 18. **Felonious Intent Necessary.**—That to constitute the crime of larceny a felonious intention, that is an intention to steal, must always exist. And, under our statute, making the conversion of property to his own use by a bailee larceny, the crime is not made out by merely showing a conversion of the property to his own use by the bailee, but it must further appear that such conversion was with an intent to steal the same. The jury are instructed, that the taking or conversion of personal property which renders a person guilty of simple larceny, or of embezzlement, is a feloniously taking or conversion, and before you can convict the defendant in this case, you must be satisfied, from the evidence, beyond a reasonable doubt, that the property mentioned in the indictment, or some part of it, was converted to his own use by the defendant, with an intention, at the time, to steal the same. *Phelps vs. The People*, 55 Ill., 334; *People vs. Husband*, 36 Mich., 306; *Hill vs. State*, 57 Wis., 377; *People vs. Galland*, 55 Mich., 628.

§ 19. **Taken with Intent to Repay Himself.**—If the jury believe, from the evidence, that the defendant did take and convert to his own use money belonging to the said A. B., and which came into his hands as the clerk of the said A. B., still, if the jury further believe, from the evidence, that when defendant so took said money, he honestly and in good faith intended and expected to replace said money, and make the

same good to the said A. B., then the jury should not find the defendant guilty under this indictment.

§ 20. **No Felonious Intent, When.**—If the jury believe, from the evidence, that the defendant, as clerk or salesman of the said A. B., received moneys belonging to him, and honestly and fairly charged himself with the same on the account books kept for that purpose, and afterwards used the money for his own benefit, without the knowledge of the said A. B., never attempting to conceal the fact, but acknowledged the same when spoken to about it, and promised to repay it as soon as he was able, these facts are all proper to be taken into account by the jury, with all the other evidence in the case, in determining the question whether the defendant used the money with any felonious or fraudulent intent; and if, upon a consideration of all the facts and circumstances proved, the jury have any reasonable doubt of such felonious and fraudulent intent, they should find the defendant not guilty. 2 Bishop on Crim. Law, § 360.

§ 21. **Embezzlement by Banker—Illinois Statute.**—If you believe, beyond a reasonable doubt, from the evidence, that the defendant was engaged in the business of banking, and in such business received on deposit with intent to defraud, from one S. D., the sum of \$——, or any other sum, that at the time such deposit was made said D. was not indebted to the defendant, that at the time of receiving said deposit the defendant was insolvent, and knew himself to be so, and that said deposit or any portion of it was lost to said D., then you should find the defendant guilty. *Murphy vs. People*, 19 Ill. App., 125.

A depositor of money in a bank is a person who places his money therein for safe keeping. *Ibid.*

It is not necessary that the prosecution should prove, by direct and positive evidence, that the defendant was insolvent on the —— day of, etc., or that he knew he was insolvent, but it is sufficient, if you are satisfied beyond a reasonable doubt, from all the circumstances in evidence in the case, that he was insolvent at that time, and took and converted the deposit with fraudulent intent. *Ibid.*

It is your province, as jurors, to say under your oaths, from the evidence, whether or not the defendant was insolvent at the time he received the deposit. *Ibid.*

§ 22. **Embezzlement by Clerk.**—The court instructs the jury, as a matter of law, that if any officer, agent, clerk or servant, of any incorporated company, or if a clerk, agent, servant or apprentice of any person or co-partnership, or society, embezzles or fraudulently converts to his own use, or takes and secretes with intent so to do, without the consent of his company, employer or master, any property of such company, employer, master, or another, which has come to his possession, or is under his care by virtue of such office or employment, he shall be deemed guilty of larceny.

§ 23. **Venue of Conversion.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant had in his possession, in this county, money which belonged to the said A., and that while he so held it, in this county, he formed the purpose and intent to convert the same to his own use, with intent to steal the same, and that he did afterwards, in pursuance of such intent, convert the same to his own use, then he would be guilty of larceny as bailee, no matter whether he actually converted the same to his own use in this county or in the county of S.

Although the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant had in his possession, in this county, money of the said A., and afterwards converted the same to his own use, still, if you further believe, from the evidence, that he carried said money into the county of S., and then for the first time formed a purpose in his own mind of converting the same to his own use, and did afterwards convert the same, etc., in the said county of S., then the jury should find the defendant not guilty. *Campbell vs. State*, 35 Ohio, 70.

§ 24. **Rule for Determining the Value of Property.**—The court further instructs the jury, as a matter of law, if they find the defendant guilty of the larceny, as charged in the indictment, it will then be their duty to find, from the evidence in the

case, the value of the property stolen, and to state such value, as found in their verdict; and if, after a careful consideration of all the evidence in the case, the jury have a reasonable doubt, arising from all the evidence, as to the value of such property being greater than twenty dollars (Iowa), it will be their duty, under the law, to find the value to be twenty dollars, or less, as shown by the evidence. *State vs. Wood*, 46 Ia., 116; *State vs. McCarty*, 34 N. W. Rep., 606.

§ 25. **Larceny—Form of Verdict—Illinois.**—The court instructs the jury, as a matter of law, that if they find the defendant not guilty they will so state in their verdict; and that, if they find the defendant guilty, they will so state in their verdict, and, if guilty, they will also state in their verdict, the value of the money or property stolen; if they find such value to be above fifteen dollars they will fix in their verdict his term of imprisonment, which may not be less than one nor more than ten years in the penitentiary. If they find the value of the money or property to be fifteen dollars, or less, they will so state, leaving the term of imprisonment in the jail or workhouse to be fixed by the court.

CHAPTER LIX.

MALICIOUS MISCHIEF.

- SEC. 1. The offense.
2. Malice, how proved.
 3. Ownership, how proved.
 4. Ownership must be proved as alleged.
 5. Injury must be proved as alleged.
 6. Malice must be proved.
 7. Malice against the owner must be proved.

§ 1. **Malicious Mischief.**—The jury are instructed, that in this case the defendant is charged with having willfully and maliciously, etc.; and if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime, in manner and form as charged in the indictment, within (*eighteen months*) before the finding of the indictment in this case, then the jury should find the defendant guilty.

§ 2. **Malice, How Proved.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant inflicted the injury upon the property in question, in manner and form as charged in the indictment, willfully and wantonly, and without any reasonable excuse being given therefor, then the law will imply malice against the owner of the property. 2 Whar. Crim. Law, 7 Ed., 2008.

§ 3. **Ownership, How Proved.**—When personal property left in the care and custody, and under the control of a person not the absolute owner, but having a legal right to such possession, not as agent or servant of such owner, is injured, the person having such control and possession has such an interest in the property as will authorize the property to be laid in the indictment, for maliciously injuring the same, as the property of the person so having it in charge. 2 Whar. Crim. Law, 2 Ed., 1818; *People vs. Horr*, 7 Barb., 9.

If the jury believe, from the evidence, beyond a reasonable doubt, that the property in question was, at the time of the alleged injury, either the absolute property of the said A. B., or that it was left in his possession by the owner, with the right to use and control the same, and with an absolute right to the possession thereof at the time of the alleged injury, then the ownership of the property is properly laid in the indictment, as the property of the said A. B.

§ 4. **Ownership Must be Proved as Alleged.**—That the property in the animal injured is laid in the said A. B., and it is material for the prosecution to prove that he had a general or special property in the animal; and unless this has been proved to the exclusion of every reasonable doubt, the defendant is entitled to an acquittal.

§ 5. **Injury Must be Proved as Alleged.**—If the jury believe, from the evidence, that the animal described in the indictment was injured by some one, in some manner, this will not authorize the jury to find the defendant guilty, unless they are satisfied, beyond a reasonable doubt, that the injury was inflicted by the defendant, and in the manner described in the indictment.

If the jury believe, from the evidence, that the animal might reasonably have been injured by some other person, or in some other manner than that charged in the indictment, this is sufficient to raise a reasonable doubt, and the defendant should be acquitted.

§ 6. **Malice Must be Proved.**—This being an indictment for malicious mischief, malice is a necessary element to be proved, or made to appear from the facts or circumstances proved. Without this ingredient the crime is not complete, and the act complained of would be only a trespass, for which the party injured would be compelled to resort to a civil action for redress. *Gaskill vs. State*, 56 Ind., 550.

§ 7. **Malice against the Owner Must be Shown.**—That the malice necessary to constitute this offense must exist against the owner of the property, or against some one having a gen-

eral or special interest therein. Malice against the animal, if proved, will not warrant a conviction. *State vs. Enslow*, 10 Ia., 115; 2 Bishop Crim. Law, § 964; *U. S. vs. Gideon*, 1 Minn., 292. *Contra: Mosby vs. State*, 28 Ga., 190.

In order to convict the defendant upon this indictment, the prosecution must prove, to the satisfaction of the jury, that the defendant knew or supposed the animal in question belonged to the said A. B., and so knowing or supposing, willfully and deliberately injured the same, through malice towards the said A. B.; and unless this has been done it is your duty to acquit the defendant. *Newton vs. State*, 3 Tex. App., 245.

If the jury believe, from the evidence, that the defendant shot and injured the animal in question, in manner and form as charged in the indictment, recklessly and wantonly, and without any provocation, then the law will presume malice against the owner, and the jury should find defendant guilty. *Mosby vs. State*, 28 Ga., 190.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant injured the (property in question) that the injury was a serious one and was done willfully and deliberately for the purpose of gain or benefit to himself, then the jury may find the defendant guilty, in manner and form as charged in the indictment, although the evidence does not show that the defendant had any personal malice towards the owner of the property. *Brown vs. State*, 26 Ohio St., 176.

CHAPTER LX.

PERJURY.

- Sec. 1. The offense—How proved, etc.
2. Proof to authorize conviction
3. Materiality, when sufficient.
4. One witness, when sufficient.
5. Authority of officer administering the oath must be shown.
6. The testimony alleged must be proved
7. No reasonable grounds of belief.
8. Testimony must be knowingly and willfully false.
9. Official character of the justice must be proved.
10. That the accused was sworn must be proved.
11. More than one witness required.
12. Every material allegation must be proved.
13. Materiality must be shown.
14. The test of materiality.

PERJURY.

NOTE.—Perjury assigned upon testimony given by defendant on a trial before a justice of the peace, in swearing that he “bought the horse of A. B., and paid \$100 cash for it at the time.”

§ 1. **Charge must be Proved in Manner and Form, etc.**—If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant knowingly and willfully testified falsely, in manner and form as charged in the indictment in this case, then the jury should find the defendant guilty.

§ 2. **Proof to Authorize Conviction.**—If the jury believe, from the evidence, beyond a reasonable doubt, that some time on or about, etc., upon the trial of an action of (*replevin*), in which the value of the property did not exceed \$—, and then pending before one R. L., an acting justice of the peace of this county, the said defendant was sworn as a witness, by said justice, and then testified that he bought the (*horse*) of A. B., and paid \$100 in cash for it at the time, in manner and form as charged in the indictment, and if the jury further be-

lieve, from the evidence, beyond a reasonable doubt, that whether he had so bought the (*horse*) of A. B., and paid \$100 in cash for it at the time, was a material question on such trial, and that such testimony was untrue and false, and known to the defendant to be untrue and false at the time he gave such testimony, then the jury should find the defendant guilty.

§ 3. **Materiality Sufficient, When.**—The jury are instructed, as a matter of law, that to render testimony material in a case it is not necessary that it should bear directly upon the main issue in the case; it is sufficient if it is material to any question arising upon the trial, and such as, if it were true, might properly influence the justice or the jury before whom the case is being tried in any matter affecting the rights of the parties. 2 Bishop on Crim. L., § 994; 3 Greenl. Evi., § 195; *Com. vs. Grant*, 116 Mass., 17.

In this case, if the jury believe, from the evidence, beyond a reasonable doubt, that a suit was being tried before the said R. L., an acting justice of the peace in this county, in manner and form as charged in the indictment, and also that one of the questions which arose on said trial was, etc. (*or that any witness testified that, etc.*), then the court instructs you, as a matter of law, that whether the said defendant bought the horse of A. B., and paid \$100 in cash for it, at the time, was a material question on said trial, and if the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant then and there was sworn as a witness by the said justice, on said trial, and testified that, etc., and that such testimony was false, and that the defendant knew it to be false when he so testified, then the jury should find the defendant guilty.

§ 4. **One Witness Sufficient, When.**—The court instructs the jury, that as to each and all of the material averments in the indictments, except the allegation of the falsity of the testimony therein stated and set forth, they may be proved by the testimony of one witness alone; provided, the jury are satisfied, beyond a reasonable doubt, of the truth thereof by the testimony of such witness; and as regards proving the falsity of such testimony, the court instructs the jury, that while that

fact cannot be established by the testimony of one witness alone, it is not absolutely necessary that it be established by the testimony of two witnesses; it may be proved by the testimony of one witness and other corroborating facts or circumstances corroborating such witness; provided, the jury are satisfied, beyond a reasonable doubt, from the testimony of such witness, and such corroborating facts and circumstances, that such testimony was false in fact. *U. S. vs. Wood*, 14 Peters, 430; 1 Greenl. Evi., § 257; *State vs. Raymon*, 20 Ia., 583.

§ 5. **Authority of the Officer Must be Shown.**—The jury are further instructed, that while it is necessary for the prosecution, in order to warrant a conviction for perjury, to show that the person administering the oath was authorized, by law, to administer oaths, still, if it be shown, by the evidence beyond a reasonable doubt, that the oath was administered by a person who was then an acting justice of the peace in and for the county where the oath was administered, this is sufficient evidence of his authority to administer the oath. *Kerr vs. People*, 42 Ill., 307; *State vs. Furlong*, 26 Me., 69; *Weston vs. Lumley*, 33 Ind., 486.

§ 6. **Testimony Alleged Must be Proved.**—The jury are further instructed, that while it is incumbent upon the people, in order to warrant a conviction, to prove, as one of the material averments in the indictment, that the defendant did testify to one or more of the statements of testimony contained in the indictment, still, it is not necessary that they should be proved in the precise words alleged; it is sufficient if they are, substantially, proved in language and effect as therein stated. *People vs. Warner*, 5 Wen., 271; 3 Greenl. Evi., § 193; *Taylor vs. State*, 48 Ala., 157.

§ 7. **No Reasonable Grounds of Belief.**—The jury are instructed, that while false swearing, under an honest belief that the statements are true, is not perjury, still, the jury are to determine, from all the evidence in the case, whether such honest belief existed; and if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant swore

falsely, as charged in the indictment, and that he had no reasonable grounds for believing his statements to be true, and did not honestly and in good faith believe them to be true, then he is guilty of perjury. *Johnson vs. The People, etc.*, 94 Ill., 505; 3 Greenl. Evi., § 200.

§ 8. **Testimony Must be Willfully and Knowingly False.**—That although the jury may believe, from the evidence, that the defendant testified as stated in said indictment, and that that testimony was false, still, if the jury have a reasonable doubt whether the defendant, knowingly and willfully, testified falsely in giving such testimony, the jury should find the defendant not guilty.

The court further instructs the jury, that to warrant a verdict of guilty in this case the prosecution must establish, by evidence, to the satisfaction of the jury, beyond a reasonable doubt, not only that the defendant testified on the occasion referred to, that, etc., as charged in the indictment, but also that that testimony was false, and furthermore, that the defendant knew it to be false, or had no good reason to believe it to be true, at the time he testified.

§ 9. **Official Character of the Justice Must be Proved.**—That among the material averments in the indictment is the statement that the defendant was sworn by R. L.; that the said R. L. was a justice of the peace, having power and authority to administer such oath; the averment that the said R. L. was a justice of the peace, like the other averments in the indictment, must be proved, by the evidence, beyond a reasonable doubt, and although this may be proved by showing that he was an acting justice of the peace in and for this county—if it be a fact that he is so, still, this fact must be established by proof; and it is not sufficiently proved, if the jury find from the evidence, that it is only shown that he acted as a justice in the trial of the cause set out in the indictment.

§ 10. **That the Accused was Sworn Must be Proved.**—That to authorize a conviction in this case it must appear, among other things, that the defendant was sworn, as a witness, before giving his alleged testimony; and this must be proved, beyond

a reasonable doubt; and if the jury entertain any reasonable doubt as to whether the defendant was affirmed instead of being sworn, in the usual manner before testifying, the jury should find the defendant not guilty. *Hitesman vs. State*, 48 Ind., 473.

§ 11. **More Than One Witness Required.**—If the jury find that the several witnesses who have testified for the prosecution (*or the witnesses, A., B. and C.*), have each testified to separate and distinct facts or circumstances, then such testimony must be considered by the jury as the testimony of a single witness upon each specific point testified to by them; and if the jury further believe, from the evidence, that only one of said witnesses has testified to facts tending to show the falsity of the testimony, set forth in the indictment, and upon which the perjury is assigned, then the prosecution has failed to prove the falsity of such testimony as required by law, unless the jury further find, from the evidence, that the testimony of such witness has been corroborated upon that point by other facts or circumstances proved on the trial. *State vs. Heed*, 57 Mo., 252; 2 Wharton Crim. Law, § 2276; *State vs. Raymond*, 20 Ia., 582; *Crusen vs. The State*, 10 Ohio St. 258; *Hendricks vs. State*, 26 Ind., 493.

The jury are further instructed by the court, that the law presumes the testimony of the defendant set out in the indictment to be true and of equal value to the testimony of any other one witness; and in order to convict the defendant of perjury the people must satisfy the jury, beyond a reasonable doubt, of its falsity, and that by the testimony of more than one witness, or by the testimony of one witness and other proofs tending to corroborate such witness; and unless the falsity of the testimony alleged in the indictment has been established by an amount of evidence greater than the testimony of one witness bearing upon that point, the jury must find the defendant not guilty, whatever may be their opinion regarding his guilt or innocence.

§ 12. **Every Material Allegation Must be Proved.**—That before the jury will be warranted in finding the verdict of guilty in this case, they must be satisfied, beyond a reasonable doubt,

from the evidence introduced before them, that the defendant was sworn as a witness by R. L., on the trial of an action of (*replevin*) pending before him, as an acting justice of the peace of this county, wherein A. was plaintiff and B. was defendant; that the value of the property in question, in said suit, did not exceed \$———; that upon such trial the defendant testified upon oath that he bought the horse of one A. B., and paid \$100 in cash for it at the time; that whether he had so bought the horse was a material question on that trial; that such testimony was false, and that the defendant knew it to be false at the time he so testified; and, unless the prosecution have proved each and all of the matters above enumerated, beyond a reasonable doubt, by evidence introduced before the jury, the jury must find the defendant not guilty. 2 Wharton Crim. Law, § 2211; *Pankey vs. State*, 1 Seam., 80; *Montgomery vs. State*, 10 Ohio, 220; *State vs. Fassett*, 16 Conn., 457.

§ 13. **Materiality Must be Shown.**—The jury are further instructed, that among the material averments in the indictment is the statement, that whether the said defendant had bought the horse therein referred to of A. B. and paid \$100 for it in cash at the time, became a material question on said trial; and to warrant a conviction in this case, the fact of such materiality must be established to the satisfaction of the jury, beyond a reasonable doubt; and if, after a careful consideration of all the evidence, and in view of the principles of law given you in these instructions, you entertain any reasonable doubts as to whether the fact above stated did become material on said trial, you should find the defendant not guilty. 2 Bishop Crim. Law, § 994; *Bullock vs. Koon*, 4 Wen., 531; *State vs. Thrift*, 30 Ind., 211; *Wood vs. People*, 59 N. Y. 117; *State vs. Aikens*, 32 Ia., 403.

§ 14. **Test of Materiality.**—That the true test of whether the alleged testimony of the defendant was material on said trial is this: Was it of such a character that, if true, it should properly influence the action of the justice or the jury on the trial in any matter affecting the rights of the parties to that suit; and if the jury find, from the evidence, that the alleged testimony could not properly influence the action of the jus-

tice, or jury, in any matter affecting the rights of the parties to the suit, then it is wholly immaterial whether it was true or false, and the jury should find the defendant not guilty. 2 Bishop Crim. Law, § 994; *State vs. Keenan*, 8 Rich., 456; *State vs. Shupe*, 16 Ia., 36; *State vs. Lavalley*, 9 Mo., 824; 3 Greenl. Ev., § 195.

CHAPTER LXI.

RAPE.

- SEC. 1. The offense defined—Consent obtained by threats.
2. Submission through fear.
3. Child under lawful age.
4. Complaining to others.
5. Consent given.
6. Prosecutrix bound to resist.
7. Power of resistance not overcome by force or fear.
8. Contact of sexual organs necessary—Penetration.
9. Character of the prosecutrix may be shown.
10. Character of the prosecutrix no defense.
11. No outcry made.
12. What is an assault with intent.
13. The reasonable doubt as to the intent.

RAPE.

§ 1. **Rape Defined—Consent Obtained by Threats.**—The court instructs the jury, that rape is the carnal knowledge of a female, forcibly and against her will, and where threats of personal violence are made to overcome her will, and she believes that her person is in danger from such threats, and is induced thereby to submit to the will of the person making such threats, and he has sexual connection with her, then the law considers such carnal knowledge as having been forcibly had, and against the will of the female.

§ 2. **Submission through Fear.**—The court instructs the jury, that where a female submits to sexual intercourse through fear of personal violence, and to avoid the infliction of great personal injury upon herself, then such carnal intercourse is indictable and punishable as a rape.

If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the said A. B. against her will, then the defendant may be guilty of the crime of rape, although the said A. B. did not make the

utmost physical resistance of which she was capable to prevent such intercourse, provided the jury further believe, from the evidence, beyond a reasonable doubt, that the defendant threatened to use force and to do her great bodily injury in case she did not submit, and that she did submit to such sexual intercourse through fear that the defendant would do her great bodily injury. *State vs. Ruth*, 21 Kans., 583.

If you believe, from the evidence in this case, that an act of sexual intercourse did take place between the defendant and the prosecutrix, as averred in the indictment, then, the question as to whether or not she did voluntarily consent to such act, is a question of fact for you to determine, from the evidence in the case. The defendant insists that she did voluntarily consent thereto, and that he used no force or coercion of any kind to compel such consent, but that she yielded to his desires upon his request alone. While the prosecution insists that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and that if she finally submitted to her fate it was against her will, and for fear of more serious consequences. You are to say from the evidence, which, if either, is right, and, if, after giving due weight to all the evidence, you find the prosecutrix did voluntarily consent to such act of intercourse, and not under coercion, you should acquit; but if you find, beyond a reasonable doubt, that the act was by force, and against her will, and find the other facts averred in the indictment established beyond a reasonable doubt, you should convict. *Anderson vs. The State*, 4 N. E. R., 63; 104 Ind., 467.

§ 3. **Child under Lawful Age.**—By the laws of this state a female child under the age of — years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child will constitute the crime of rape, whether with or without the consent of such child; and in this case, if you believe, from the evidence, beyond a reasonable doubt, that the defendant had carnal connection with the said A. B., and that at the time she was under the age of — years, then the defendant is guilty of rape and the jury should so find.

§ 4. **Complaining to Others.**—If the jury believe, from the evidence, that the prosecuting witness told her (*husband*) of the assault, alleged to have been made on her, at the earliest opportunity, then that is a corroborating circumstance tending to sustain the truth of her statements. *State vs. Niles*, 47 Vt., 82; *Pefferling vs. State*, 40 Texas, 486.

That in this class of cases the main facts can usually be proved only by the woman on whom the assault is committed, and by the proof of corroborating circumstances.

If the jury believe, from the evidence, that at the time the offense is alleged to have been committed, the prosecuting witness made no outcry, and did not immediately complain of the offense to others, but concealed it for a considerable length of time afterwards, then the jury should take this circumstance into consideration with all the other evidence, in determining the question of the guilt or innocence of the accused, and whether a rape was in fact committed or not.

Though the jury may believe, from the evidence, that the prosecuting witness did not tell her (*mother*) or others of the alleged outrage upon her until, etc., still, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant was guilty of the crime charged in the indictment, and, if the jury further believe, from the evidence, that at the time of the alleged outrage the defendant threatened to take her life if she ever told of what had occurred, and she was afraid she would lose her life, or suffer some great bodily harm, if she should tell of the injuries complained of, then these facts would excuse the prosecuting witness from communicating the knowledge of such injury to others. *Turner vs. The People*, 33 Mich., 363.

§ 5. **Consent Given.**—If the jury believe, from the evidence, that the prosecuting witness, L. X., was a female above the age of (*ten*) years at the time of the alleged offense, then she was capable in law of giving her consent to any carnal knowledge of her by the defendant; and before you can find the accused guilty, you must be satisfied, from the evidence, beyond a reasonable doubt, that he had carnal knowledge of the said L. X. forcibly and against her will.

To authorize a conviction for rape the jury must believe,

from the evidence, beyond a reasonable doubt, that the defendant had carnal connection with the prosecuting witness against her will, and that she did not yield her consent during any part of the act. To constitute the crime of rape the will of the female alleged to have been outraged, must have been overcome either by force, violence, or fear. If she consents in the least during any part of the act, there is not such an opposing will as the law requires to convict on the charge of rape. *Brown vs. The People*, 36 Mich., 203; *Ulrich vs. The People*, 39 Mich., 245.

§ 6. **Prosecutrix Bound to Resist.**—If the jury believe, from the evidence, that at the time the rape is alleged to have been committed, the prosecuting witness had it in her power to resist the defendant, and prevent the offense by kicking, striking and biting him, or by any other mode calculated to repel his attack, and that she failed to make all the resistance then in her power to make, then this is a circumstance that the jury should take into consideration with all the other evidence in the case, and as tending to show that no rape was committed. *Anderson vs. The State*, 104 Ind., 467; *Matthews vs. The State*, 19 Neb., 330.

If the jury believe, from the evidence, that the force and resistance used by the prosecutrix, and relied upon by the prosecution for a conviction, at the time of the commission of the alleged rape, were so feebly exerted by her as to have invited rather than discouraged the advances of the accused, they may well doubt whether the rape was committed, and, if they do so doubt, they should find the defendant not guilty. *People vs. Morrison*, 1 Parker Crim. R., 625; *People vs. Abbot*, 19 Wend., 192; *Hull vs. State*, 22 Wis., 580; *Croghan vs. State*, 22 Wis., 444; *State vs. Cross*, 12 Ia., 66.

§ 7. **Power of Resistance not Overcome by Force or Fear.**—If the jury believe, from the evidence, that the prosecutrix, at the time of the alleged offense, was a strong, robust woman, and that the defendant made no threats of personal violence, and in no manner deprived her of her strength, then the jury may well doubt whether the crime of rape was committed; and if they do so doubt, they cannot convict the defendant of that crime.

That it is a well settled principle of law that when the accuser and the accused are both in the possession of health and strength, and of the ordinary amount of physical and mental power, and in circumstances to fully exercise that power, the perpetration of the crime of rape is of difficult, if not impossible, occurrence.

§ 8. **Contact of Sexual Organs Necessary—Penetration.**—The court further instructs the jury, that in a prosecution for rape upon a female above the age of (*ten*) years, where the people rely exclusively upon proof that threats and intimidation are employed to gain the consent of the female upon whom the rape is charged, such threats and intimidation, together with actual contact of the sexual organs, must be proved, beyond a reasonable doubt, before the accused can be convicted of rape.

§ 9. **Character of the Woman May be Shown.**—The jury are instructed, that in prosecutions of this kind the character of the woman may be called in question for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, and if the jury believe, from the evidence, that the prosecuting witness is a woman of bad fame or evil repute, they may take this fact into consideration for that purpose, together with all the other evidence in the case, in determining the amount of credit to which her testimony may be entitled. *Anderson vs. The State*, 4 N. E. Rep., 63.

§ 10. **Character of Prosecutrix no Defense.**—All persons are entitled to equal protection before the law; and it matters not what may have been the previous character of a woman, she cannot be assaulted with impunity; and where the law does not discriminate, you, as a jury, cannot; hence an assault upon any woman with the intent to commit a rape is a crime, and the person making the assault is amenable to the law.

And in this case, if you believe, from the evidence, that defendant made an assault upon A. B., and that said assault was committed with intent to commit a rape as charged in the indictment, you should find the defendant guilty. *Pefferling vs. The State*, 50 Texas, 486.

Evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputation for chastity and virtue. You are not to understand from this that a rape cannot be committed upon a woman of bad moral character. A woman may be a common prostitute and may still be the victim of a rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will, upon the theory that a person of bad moral character is less likely to speak the truth as a witness, than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse, than one who is unchaste. So that whatever conviction this evidence may produce in your minds as to whether she is of good or bad moral character, or as to whether she is chaste or unchaste, you will treat it as a circumstance affecting her credibility to aid you in determining whether her story is true or false, and the act of intercourse voluntary or against her will. *Anderson vs. State*, 4 N. E. R., 63; 104 Ind. 467.

§ 11. **No Outcry Made.**—If the jury believe, from the evidence, that at the time of the alleged rape other people were at the same time in the same house, who might easily have heard her had she made any outcry, and that she in fact made no outcry at the time defendant was attempting to have connection with her, these facts will tend to raise a presumption that no rape was committed upon her at the time. *State vs. Hagerman*, 47 Ia. 151.

§ 12. **Assault with Intent to Commit a Rape.**—The jury should convict the defendant of an assault with intent to commit a rape, if they believe, from the evidence, beyond a reasonable doubt, that at the time in question he committed an assault on the prosecutrix for the purpose of having carnal intercourse with her, and that in making the assault he intended to use whatever force might be necessary to overcome the prosecutrix and accomplish his purpose. *State vs. Cannada*, 68 Ia., 397; *Krum vs. State*, 19 Neb., 728.

It must be shown in this case by the evidence, beyond a

reasonable doubt, not only that the defendant committed an assault upon the female, but that he did so with intent to compel her, by force and against her will, to have sexual intercourse with him notwithstanding any resistance she might make. *State vs. McDevitt*, 69 Ia., 549; *State vs. Kendall*, 34 N. W. Rep., 843.

In order to convict the defendant of an assault with an intent to commit a rape, the jury must be satisfied beyond a reasonable doubt, from the evidence, that the defendant assaulted the prosecuting witness with the intent at the time to overcome any resistance which might be offered by her. And so although the jury may believe that the defendant, inflamed with passion, went to the bed of the prosecuting witness with intent to have carnal connection with her, still, if you have any reasonable doubt, from the evidence, as to whether he intended to accomplish his purpose by force and to overcome by violence or fear any force that might be offered to resist him, or whether he went with the design only to accomplish his purpose if he could without force or threats, then the act would only amount to an assault or assault and battery, but the defendant cannot be convicted of an assault with an intent to commit a rape. *People vs. Lynch*, 29 Mich., 274.

If you are satisfied beyond a reasonable doubt, from the evidence, that the defendant took hold of the prosecuting witness with intent to have carnal intercourse with her against her will, and with an intent to accomplish his object at all events by his strength and power, or by threats of violence, against any resistance which she might offer, then he was guilty of an assault with intent to commit a rape, whether he succeeded in his purpose or not. *People vs. Lynch*, 29 Mich., 274.

§ 13. **The Intent Must be Shown Beyond a Reasonable Doubt.**—The jury are further instructed, as a matter of law, that the intent is, in this case, the essence of the offense charged, and, although you may find, from the evidence, that the defendant did commit an assault upon the prosecutrix for the purpose of having carnal intercourse with her, still, if, after considering all the evidence in the case, you are not satisfied beyond a reasonable doubt, that, at the time of committing the assault, he intended

to compel her by force and against her will, to have sexual intercourse with him, notwithstanding any resistance she might make, then it will be your duty, under the law, to acquit the defendant. *State vs. Cannada*, 68 Ia., 397; *Krum vs. The State*, 19 Neb., 728; *State vs. Kendall*, 34 N. W. Rep., 843.

CHAPTER LXII.

ROBBERY.

- SEC. 1. Robbery defined.
2. Facts constituting robbery.
3. The taking must be by force or fear.
4. Property must be proved as charged.
5. The verdict may be for larceny.
6. What is meant by taking from the person, etc.—People's instructions in *State vs. Calhoun*, Iowa.

ROBBERY.

1. **Robbery Defined.**—The court instructs the jury, that robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another, by force or intimidation.

The court instructs the jury, as a matter of law, that robbery is the felonious and violent taking of money, goods or other valuable thing, from the person of another by force or intimidation. Every person guilty of robbery, shall be imprisoned in the penitentiary not less than one year nor more than fourteen years; or if he is armed with a dangerous weapon, with intent, if resisted, to kill or main such person, or being so armed, he wounds or strikes him, or if he has any confederate present so armed, to aid or abet him, he may be imprisoned for any term of years or for life. (Illinois.)

§ 2. **Facts Constituting Robbery.**—If the jury believe, from the evidence, beyond a reasonable doubt, that some time about the day of, etc., A. B. was at the saloon of E. M., in this county, and that he then had in his possession any of the treasury notes or bank bills described in the indictment in this case, and that such notes or bills were genuine, and of some value, and further, that one C. D. requested the said A. B. to loan him some money, and that thereupon the said A. B. took out his said treasury notes or bank bills for the purpose of making

such loan, and further, that the said defendant then grabbed the said money and forcibly took the same from the person of the said A. B., and then ran away with said money, with the intention of stealing the same, this would constitute robbery on the part of the defendant, and the jury should find him guilty, in manner and form as charged in the indictment. *Roscoe's Crim. Evi.*, 893.

The jury are instructed, that to constitute the crime of robbery, it is not necessary that any force be used to obtain possession of the property. It is sufficient if such possession is obtained from the person of the owner, against his will, by threats or menaces of personal violence against him. *Shinn vs. State*, 64 Ind., 13.

To constitute the crime of robbery it is not necessary that the property should be actually taken from the person of the owner; if it is in his personal custody, and is taken in his presence, without his consent, by force, or by putting him in fear, it is sufficient to maintain an indictment for robbery. *Roscoe's Crim. Evi.*, 895; *State vs. Calhoun*, 34 N. W. Rep., 194; 2 Bish. C. L., § 975; Whart. Crim. Law, § 1696.

§ 3. **Taking Must be by Force or Fear.**—To justify a verdict of guilty of robbery, in manner and form as charged in the indictment, it must appear, from the evidence, to the satisfaction of the jury, beyond a reasonable doubt, that some one or more of the treasury notes, or bank bills, described in the indictment, were taken from the person or from the immediate presence and possession of the said A. B. by the defendant by force, or by putting him in fear; and unless this has been proved, beyond a reasonable doubt, the jury should acquit the defendant from the charge of robbery.

§ 4. **Property Must be Proved, as Charged.**—In order to convict the defendant on the charge of robbery, the people must prove, beyond a reasonable doubt, that the bills or treasury notes mentioned in the indictment, or some of them, were feloniously, and against the will of the said A. B., taken from his person or from his immediate presence and possession, in manner and form as charged in the indictment; and unless this has been so proved, the jury should find the defendant not guilty of the charge of robbery.

§ 5. **Verdict may be for Larceny.**—If, in view of all the evidence in this case, the jury entertain any reasonable doubt as to whether the defendant obtained the goods in question from the possession of the plaintiff by force or intimidation, but do believe, from the evidence, beyond a reasonable doubt, that the defendant feloniously took the property in question from the possession of the plaintiff by stealth or by fraud, with intent to steal the same, in manner and form as charged in the indictment, then the jury may find the defendant guilty of the crime of larceny.

NOTE.—Statement. The defendant bound the prosecuting witness and putting her in fear by this violence he extorted from her information of the place where she kept her money and watch in another room of the house. Leaving her bound he went into that room and took the money. The Supreme Court of Iowa held that the money was taken from her person in the sense of the words used in the statute. Citing 2 Bish. Crim. Law, § 975; Whart Crim. Law, § 1696. The following instructions for the State were sustained. (*State vs. Calhoun*, 4 N. W. Rep. 194.)

§ 6. **What is Meant by Taking from the Person.**—It is provided by our statutes that if any person with force or violence, or by putting in fear, steal and take from the person of another any property that is subject of larceny, he is guilty of robbery.

Under this statutory provision, it is not essential that the stealing and taking, if any, was literally from the person, or, in other words, that the property, if any, was on, or attached to, or touching, the literal physical person of the party alleged to have been robbed, but it is sufficient if the stealing and taking, if any, was done in the immediate presence of such person, and while the property was under the control and in the custody of such party.

If, therefore, you find from the evidence, beyond a reasonable doubt, that the defendant, in this county and state, at a time within three years next preceding the finding of the indictment in this case, did steal and take from the immediate presence of the said N. B., named in the indictment, the property named in the indictment, or some part of it, and that the stealing and taking, if any, was accomplished with force or violence towards said N. B., or by putting her in fear, and you further so find that the property, if any, thus stolen, was at the time owned by, or in the possession of, said N. B., and

was of some value, then and in such case you should return a verdict of guilty of robbery; but if you do not so find as to these several matters, you cannot find the defendant guilty of robbery.

It is not necessary, in order to constitute a stealing and carrying away in the immediate presence of the said N. B., that it should have been done, if done, in her immediate view or where she could see it done. And if you find, from the evidence, beyond a reasonable doubt, that the defendant made a violent assault upon said N. B. by choking her and causing her to fall upon the floor of one of the rooms or apartments of her house, and then tied her hands and feet for the purpose and with the intention of stealing some money or property in the house, and you further so find that she, through fear of personal violence, told defendant where her money or watch was in an adjoining room or rooms, and you further so find that thereupon defendant passed through a door or doors into such room or rooms, and did there, within hearing of said N. B., take and carry away from said room or rooms the property described in the indictment, or some part thereof, and you further so find that such property was under her immediate control, and that such taking, if any, was against the will of the said N. B., and was without any right or claim of right of defendant in said property, and with the intent to permanently deprive her thereof, then, and in such case, there would be a sufficient stealing and taking from the immediate presence of the said N. B., within the meaning of the law.

It is charged in the indictment that, at the time of the alleged robbery, the defendant was armed with a dangerous weapon, with intent, if resisted, to kill or maim the said N. B., and, being so armed, did wound said N. B. If you find the defendant guilty of robbery, you will determine whether this charge in the indictment is sustained. The only evidence relied upon by the state, as tending to show that defendant was armed with a deadly weapon, is the evidence tending to show that, at the time of the alleged robbery, the defendant had with him the piece of cord or rope introduced in evidence. It is for you to say from the evidence, whether he did have and used such cord or rope; and, if he did, whether the same was a dangerous weapon; and, if it was,

whether he intended by the use of it (if he did use it) if resisted, to kill or maim said N. B. therewith or did wound her.

A dangerous weapon is one which, from the use made of it at the time, is likely to produce death, or do great bodily harm; and unless you find that said cord or rope was of such a character you cannot find that the defendant was armed with a dangerous weapon. If it was only calculated to produce, from the use of it (if used), a slight injury upon the person of the said N. B., then it would not be a dangerous weapon within the meaning of the law.

CHAPTER LXIII.

MISCELLANEOUS CRIMINAL INSTRUCTIONS.

- SEC. 1. Attempt to commit a crime.
2. Bigamy.
3. Concealing stolen property.
4. Counterfeiting.
5. False pretenses.
6. Forgery.
7. Habitual criminal.
8. Taking property without consent of owner.
9. Seduction.

§ 1. **Attempt to Commit a Criminal Offense.**—The court instructs the jury, as a matter of law, that whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one, nor more than five years; in all other cases, by fine not exceeding three hundred dollars, or by confinement in the county jail not exceeding six months.

§ 2. **Bigamy—Illinois Statute.**—The court instructs the jury, as a matter of law, that whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall be deemed guilty of bigamy, and be imprisoned in the penitentiary not less than one nor more than five years, and fined not exceeding \$1,000. *Provided*, nothing herein contained shall extend to any person whose husband or wife shall have been continually absent from such person for the space of five years together, prior to said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person who is, or shall be at the time of such second marriage, divorced by lawful

authority from the bands of such former marriage, or to any person where the former marriage hath been, by lawful authority, declared void.

It shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases. The offense may be alleged to have been committed, and the trial may take place in the county where cohabitation shall have occurred.

§ 3. **Concealing Stolen Property.**—The court instructs the jury, as a matter of law, that every person, who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, or if such goods or other property or thing does not exceed the value of fifteen dollars, he shall be fined not exceeding one thousand dollars and confined in the county jail not exceeding one year.

§ 4. **Counterfeiting**—Illinois Statute.—The court instructs the jury, as a matter of law, that whoever shall make, pass, utter or publish, with an intention to defraud any other person, or with like intention shall attempt to pass, utter or publish, or shall have in his possession, with like intent to pass, utter or publish, any fictitious bill, note or check purporting to be the bill, note or check, or other instrument of writing for payment of money or property of some bank, corporation, co-partnership or individual, when, in fact, there shall be no such bank, corporation, co-partnership or individual in existence, the said person, knowing the said bill, note, check or instrument of writing for the payment of money or property to be fictitious, shall be imprisoned in the penitentiary not less than one nor more than twenty years.

§ 5. **False Pretenses**—Illinois.—The court instructs the jury, as a matter of law, that whoever, with intent to cheat or defraud another, designedly by color of any false token or writ-

ing, or by any false pretense, obtains the signature of any person to any written instrument, or obtain from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding \$2,000, and imprisoned not exceeding one year, and shall be sentenced to restore the property so fraudulently obtained, if it can be restored. No person indicted for such offense, shall be acquitted, for the reason that the facts set forth in the indictment, or appearing in evidence, may amount to a larceny or other felony; nor shall it be deemed essential to a conviction, that the property in the goods or things so obtained shall pass with the possession to the person so obtaining it.

§ 6. Forgery—Illinois Statute.—The court instructs the jury, as a matter of law, that every person who shall falsely make, alter, forge or counterfeit any record or other authentic matter of a public nature, or any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, power of attorney, any auditor's warrant for the payment of money at the treasury, county order, or any accountable receipt, or any order or warrant, or request for the payment of money or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release or receipt for money or goods (or any acquittance, release or discharge of any debt, account, action, suit, demand or other thing), real or personal, or any transfer or assurance of money, stock, goods, chattels, or other property whatever, or any letter of attorney or other power to receive money, or to receive or transfer stock or annuities, or to let, lease, dispose of, alien or convey any goods or chattels, lands or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft or order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or any ticket or pass for the passage of any person upon any railroad or other conveyance, or for the admission of any person to any entertainment for which a consideration is required, or any other written instrument of

another, or purporting to be such, by which any pecuniary demand or obligation, or any right in any property is, or purports to be, created, increased, conveyed, transferred, diminished or destroyed, or shall counterfeit or forge the seal or handwriting of another, with intent to damage or defraud any person, body politic or corporate, whether the said person, body politic or corporate, reside in or belong to this state or not, or shall utter, publish, pass or attempt to pass as true and genuine, or caused to be uttered, published, passed or attempted to be passed as true and genuine, any of the above named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, damage or defraud any person, body politic or corporate, whether the said person, body corporate or politic, reside in this state or not, every person so offending shall be deemed guilty of forgery, and shall be imprisoned in the penitentiary, etc.

§ 7. **Habitual Criminals.**—*Illinois Statute.*—The court instructs the jury, as a matter of law, that whenever any person having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, shall thereafter be convicted of any one of such crimes, committed after such first conviction, the punishment shall be imprisonment in the penitentiary for the full term provided by law for such crime at the time of such last conviction therefor; and whenever any such person, having been so convicted the second time, as above provided, shall be again convicted of any of said crimes, committed after said second conviction, the punishment shall be imprisonment in the penitentiary for a period not less than fifteen years. Provided, that such former conviction or convictions, and judgment or judgments, shall be set forth in apt words in the indictment.

§ 8. **Taking Property without Consent of the Owner.**—The court instructs the jury, as a matter of law, that, in the language of the statute, whoever willfully and maliciously takes, drives, rides or uses any horse, ox or other draught animal, or takes or uses any vehicle or boat, the property of another, without the consent of the owner or person having legal cus-

tody, care and control of the same, shall be fined not exceeding three hundred dollars, or be confined in the county jail not exceeding one year. The provisions of this section shall not apply to any case of taking the property of another with intent to steal the same.

§ 7. *Seduction*.—The jury are instructed that illicit intercourse alone does not constitute the crime of seduction. To constitute this offense it must appear from the evidence, beyond a reasonable doubt, that the complaining witness yielded to some sufficient promise or inducement held out to her by the defendant and had been thereby drawn aside from the path of virtue which previous to that time she had been honestly pursuing. *People vs. Clark*, 33 Mich., 112.

If an unmarried man by his visits and attentions to an unmarried female gains her affections and confidence and importunes her to sexual intercourse with him, and she, through her love for and confidence in him, yields to his solicitations, this is seduction. *Smith vs. Yaryan*, 69 Ind., 445.

Though the jury may believe, from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the complaining witness, still, if the jury further believe, from the evidence, that he had such intercourse by force and against the will of the said A. B., this would not constitute the crime of seduction, and the jury should acquit the defendant of that charge. *State vs. Dewis*, 48 Ia., 578.

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